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IN THE

Supreme Court of the United States

JENNY LEE HENRY, a/k/a Karen Allen, a/k/a Karen Henry, a/k/a Annette Williams, a/k/a Andrea Scantlebury, a/k/a Williams Sherlly, a/k/a Jennylee Henry, a/k/a Lorna Williams, a/k/a Sharon Smith, a/k/a Jennymary Henry, a/k/a Shelly Williams, a/k/a Williams,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 10, 2008

* Attorney General Michael B. Mukasey was automatically substituted below as the respondent for the former Attorney General, Alberto Gonzales, under Federal Rule of Appellate Procedure 43(b)(2).

QUESTIONS PRESENTED

1. Section 212(h)(1)(B) of the Immigration and Nationality Act ("INA") provides that an alien who would otherwise be inadmissible to the United States is eligible for a waiver of inadmissibility if she demonstrates that denial of her admission would result in "extreme hardship" to certain family members. INA Section 212(h)(1)(C) further provides that the Attorney General may, in his discretion, condition waiver on the filing of a concurrent application for adjustment of status.

Does the Attorney General violate equal protection when one classification of lawful permanent residents ("LPRs") is required to file a concurrent application for adjustment of status but other similarly situated LPRs are not required to do so?

2. An application for a Section 212(h) waiver requires the Attorney General to make a determination of "extreme hardship" in order for an alien to receive the waiver. The Attorney General may also consider discretionary factors. The Board of Immigration Appeals ("BIA") has said that a statutory finding of "extreme hardship" is *ipso jure* a favorable factor to the alien in the discretionary analysis.

Does the INA require the Attorney General to make a determination on "extreme hardship" before he denies a Section 212(h) waiver solely as a matter of discretion?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jenny Lee Henry respectfully prays for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

DECISIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a–7a) is reported at 264 F. App'x 62 (2d Cir. Feb. 11, 2008). The decision of the BIA (Pet. App. 15a-30a) is unreported. The original decision of the Immigration Judge ("IJ") (Pet. App. 31a-74a) is unreported.

JURISDICTION

The Second Circuit entered its judgment dismissing Ms. Henry's petition for review on February 11, 2008. (Pet. App. 2a). A timely petition for rehearing was denied on May 23, 2008. (Pet. App. 13a-14a). Ms. Henry's motion to stay the issuance of the mandate pending the filing of a petition for a writ of certiorari was granted by the Second Circuit on June 10, 2008. (Pet. App. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. art. V.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. art. XIV § 1.[1]

3. INA § 212(h), 8 U.S.C. § 1182(h), (Pet. App. 80a-81a), provides in relevant part:

> . . . The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section . . . if—
>
> . . .
>
> (1) . . . (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney Gen-

[1] While the Fourteenth Amendment's equal protection clause applies to the States, this Court has held that the Fifth Amendment imposes the same equal protection requirements on the Federal Government. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

eral that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

4. INA § 240A(a), 8 U.S.C. § 1229b(a), (Pet. App. 82a-83a), provides in relevant part:

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. INA § 242(a), 8 U.S.C. § 1252(a), (Pet. App. 86a-88a), provides in relevant part:

> (2) . . . (D) Judicial review of certain legal claims. Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.
>
> (5) . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). . . .

STATEMENT OF THE CASE

This case raises important and recurring constitutional and statutory questions relating to relief from removal afforded to aliens under INA Section 212. The questions arose here in the context of the removal proceedings brought against petitioner Ms. Henry.[2] The material facts of the case are as follows.

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[2] By way of background, in 1996 Congress amended the INA to replace the terms "deportation proceedings" and "exclusion proceedings," which are now both encompassed by the umbrella term "removal proceedings" that include: 1) pro-

Ms. Henry emigrated from Guyana and was admitted into the United States as an LPR in 1984. (Pet. App. 32a). Since that date she has not left the United States. (Pet. App. 203a). Ms. Henry is the mother and sole caretaker of five daughters, all of whom are U.S. citizens and four of whom are minors. (Pet. App. 32a, 66a). Ms. Henry herself did not become a citizen.

In 2000, removal proceedings were initiated against Ms. Henry due to several shoplifting convictions. She was served with a Notice to Appear, dated June 12, 2000, charging her with deportability pursuant to INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), as an admitted alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. (Pet. App. 31a). Ms. Henry conceded deportability and filed applications for a waiver of inadmissibility pursuant to INA Section 212(h) and for cancellation of removal pursuant to INA Section 240A(a). (Pet. App. 36a).[3] Ms. Henry,

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ceedings against an alien who comes to the United States and seeks admission to the country and is charged with a ground of inadmissibility (formerly "exclusion") under INA Section 212; and 2) proceedings against an alien who was admitted to the United States and is subsequently charged with a ground of deportability under INA Section 237. *See* INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2); *see also* Stephen H. Legomsky, *Immigration & Refugee Law & Policy* 496 (4th ed. 2005).

[3] Even though Section 212(h) refers to waiver of grounds of inadmissibility, the BIA has also extended the relief to LPRs charged with grounds of deportability. *See* Charles Gordon et al., *Immigration Law & Procedure* § 51.03[3] (rev. ed. 2001) (hereinafter "Gordon, *Immigration Law*").

already an LPR, did not also file an application for adjustment of status, which is ordinarily the process by which a non-LPR becomes one. *See* Gordon, *Immigration Law* § 51.01.

On December 9, 2005, the IJ denied Ms. Henry's Section 212(h) application on the grounds that she was statutorily ineligible for such relief because she had not submitted a concurrent application for adjustment of status. (Pet. App. 72a-73a). The requirement was imposed on Ms. Henry because she was an LPR who had remained in the United States through the date on which the Attorney General initiated removal proceedings. Under the IJ's interpretation of Section 212(h), if Ms. Henry had left the country, and been charged as deportable after reentry, she would have been eligible for Section 212(h) relief without a concurrent application for adjustment of status. (*Id.*). Ms. Henry argued that this distinction violated equal protection but the IJ held that the agency "cannot rule on the constitutionality of laws enacted by Congress." (Pet. App. 73a).

The IJ never determined whether or not Ms. Henry met the separate "extreme hardship" eligibility requirement under Section 212(h). (*Id.*). Instead, in addition to holding that Ms. Henry was otherwise ineligible because she had not filed a concurrent adjustment of status application, he held in the alternative that, even if Ms. Henry were eligible, he would deny the application as a matter of discretion. (*Id.*). In doing so, the IJ cited the exact same discretionary factors he had considered with

respect to her application for cancellation of removal under INA Section 240A(a). (*Id.*). However, Section 240A(a) does not require the IJ to make a determination of "extreme hardship," nor did the IJ do so here. *See* 8 U.S.C. § 229b(a), (Pet. App. 82a-83a).

The BIA affirmed the IJ's decision and dismissed Ms. Henry's appeal.[4] Ms. Henry filed a petition for review with the Second Circuit, which had jurisdiction to review the agency's final order of removal pursuant to INA § 242(a)1, 8 U.S.C. § 1252(a)(1), (Pet. App. 84a), and over the constitutional claims and questions of law raised in the petition for review pursuant to INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), (Pet. App. 86a).

On appeal, Ms. Henry argued that the agency's ruling that she was statutorily ineligible for a Section 212(h) waiver violated equal protection because it was arbitrarily based on her status as an LPR who had not left the country and had not filed an application for adjustment of status. (Pet. App. 165a-170a, 201a-03a). In particular, she argued that there was no rational basis for distinguishing her from a similarly situated LPR who had committed a deportable criminal offense, had left and returned to the United States, and was charged with a ground of deportation after reentry. (*Id.*).

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[4] The Second Circuit treated the BIA's decision as supplementing the IJ's ruling and thus both were considered on the petition for review. (Pet. App. 4a) (citing *Chen v. BIA*, 435 F.3d 141, 144 (2d Cir. 2006)). References to "the agency" herein refer collectively to the BIA and IJ.

She also asserted that Section 212(h) required the agency to make a specific determination on "extreme hardship" prior to exercising discretion to deny a waiver because such a finding, once established, becomes a discretionary factor in favor of relief. *See In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (BIA 1996), (Pet. App. 293a-302a); (Pet. App. 170a-75a, 203a-06a). She further argued that the IJ's exercise of discretion in the Section 240A(a) context—where the statute, unlike Section 212(h), makes no mention of "extreme hardship" or hardship at all—did not satisfy that requirement. (*Id.*).

The Second Circuit denied review by summary order, dated February 11, 2008. (Pet. App. 1a-7a). In doing so, the Second Circuit characterized the entirety of Ms. Henry's arguments as a challenge to the agency's application of discretion. Thus, the court of appeals said that it did not have jurisdiction to review the petition under INA § 242(a)(2), which limits review of applications under Section 212(h) to constitutional issues and legal questions. (Pet. App. 6a).

The Second Circuit also cited the Supreme Court's decision in *INS v. Bagamasbad* for the proposition that "'absent an express statutory requirement' to the contrary, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief." (Pet. App. 5a) (alteration omitted) (citing 429 U.S. 24, 25 (1976) (*per curiam*)). In *Bagamasbad*, an alien had applied for adjustment of status

but "conceded that [her] application would have been properly denied whether or not she satisfied the statutory eligibility requirements." 429 U.S. at 26. The Supreme Court's *per curiam* opinion held: "*In these circumstances*, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility." *Id.* (emphasis added).

Ms. Henry filed a petition for panel rehearing and hearing *en banc* arguing, *inter alia*, that the Second Circuit panel had failed to address her equal protection argument and had mischaracterized her other arguments with respect to "extreme hardship" as a challenge to the IJ's discretion. (Pet. App. 108a-127a). In fact, in addition to bringing an equal protection claim, Ms. Henry argued that it was legally improper under Section 212(h) for the IJ to exercise his discretion before making a determination on the statutory eligibility requirement of "extreme hardship." Because the BIA has said that "extreme hardship" is *ipso jure* a favorable factor in the agency's balancing of the equities, Ms. Henry argued that if the agency had made a determination on the issue it could have altered the outcome of her application. (Pet. App. 124a) (citing *Mendez-Moralez* 21 I. & N. Dec. at 301 ("those found eligible for relief under section 212(h)(1)(B) will by definition have already established extreme hardship to qualified family members, which would be a factor favorable to the alien in exercising discre-

tion")). Thus, unlike Bagamasbad, she had not conceded that her application would have been denied even if the IJ had found her statutorily eligible.

The petition for rehearing was denied without opinion on May 23, 2008. (Pet. App. 13a-14a). Ms. Henry filed a motion with the Second Circuit for a stay of the issuance of the mandate pending this Petition for a Writ of Certiorari, and the motion was granted on June 10, 2008. (Pet. App. 12a, 90a-107a). The Department of Justice, on behalf of the respondent, filed a motion to reconsider the stay on June 12, 2008, which Ms. Henry opposed on June 18, 2008. (Pet. App. 348a). That motion is still pending before the Second Circuit as of the date of this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because the result below exacerbates an existing circuit split on the equal protection issue of whether the Attorney General may distinguish between deportable LPRs on the grounds of whether or not they have left and reentered the country. The agency held here that Ms. Henry was ineligible for Section 212(h) relief based on her status as an LPR who had *not* left the country prior to her removal proceedings and had not filed an application for adjustment of status. (Pet. App. 28a, 72a-73a). That decision is in direct conflict with the Eleventh Circuit's decision squarely rejecting the same result on equal protection grounds. *See Yeung v. INS*, 76 F.3d 337, 340-41

(11th Cir. 1995) (holding that a deportable alien who has not traveled abroad and who could not apply for adjustment of status is eligible for a Section 212(h) waiver); *but see Klementanovsky v. Gonzales*, 501 F.3d 788, 791-94 (7th Cir. 2007) (no equal protection violation where Section 212(h) relief is limited to aliens seeking admission or deportable aliens applying for adjustment of status). Indeed, the result here is inconsistent with the logic of the Second Circuit's prior decisions holding that a distinction premised solely on whether an alien has departed and returned to the country (the same distinction made by the agency here) is without rational basis and violates equal protection. *See Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976) (equal protection requires that INA Section 212(c) relief apply to a deportable LPR regardless of whether he has left the United States and returned); *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007) (equal protection requires that a Section 212(c) waiver be available to an LPR whose crime renders her deportable as long as the same crime would render her inadmissible—even if the crime is not enumerated as a basis of inadmissibility).[5]

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[5] Where, as here, an intra-circuit conflict relates to a recurring and important issue or is accompanied by a "widespread conflict among the circuits," it favors the grant of certiorari. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 457 (1967); *see also, e.g., Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to address question on which the Ninth Circuit "expressed divergent views").

The uncertainty surrounding whether LPRs similarly situated to Ms. Henry must file a concurrent application for adjustment of status when applying for a Section 212(h) waiver is of vital importance. Indeed, many LPRs may be precluded from filing for adjustment of status, and under the agency's ruling here, which was left undisturbed by the Second Circuit, all such LPRs would be deprived of Section 212(h) relief if, like Ms. Henry, they have not left the country since they entered. Ms. Henry submits that this harsh result violates equal protection because she is arbitrarily treated differently than similarly situated LPRs who are eligible for Section 212(h) waivers without filing concurrent applications for adjustment of status. Given the circuit split on the issue, it should be finally decided by the Supreme Court.

The Second Circuit's determination to dismiss the appeal for lack of jurisdiction, rather than to address the merits of the equal protection claim, does not militate against a grant of certiorari but rather favors it. The IJ said he would deny Ms. Henry's application as a matter of discretion, but he did not make the prerequisite determination on "extreme hardship" as required by Section 212(h). However, a finding of extreme hardship is *ipso jure* a factor that tilts the balance of equities in favor of the applicant and thus is inextricably intertwined in the statute with the agency's discretionary determination. *See Mendez-Moralez*, 21 I. & N. at 301, (Pet. App. 302a). Moreover, the IJ could not simply import the hardship analysis from Section

240A(a)—which does not even refer to hardship—to deny the separate Section 212(h) application. *Cf. Bastanipour v. INS*, 980 F.2d 1129, 1131 (7th Cir. 1992) (Posner, J.) (BIA's "resolution of the section 212(c) issue does not fill the gap left by its failure to discuss the issue of discretion under the asylum provision"). These were questions of law—not questions of discretion—and the Second Circuit plainly had jurisdiction to address them. *See* INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), (Pet. App. 86a).

Finally, the Second Circuit's reliance on *Bagamasbad* to dismiss the appeal was erroneous. (Pet. App. 5a). In *Bagamasbad*, unlike here, the statutory eligibility analysis—whether the alien would be eligible for an immigrant visa and admissible into the United States as a permanent resident—was not intertwined with the IJ's discretionary analysis. Moreover, in *Bagamasbad*, it was conceded that even if the applicant had met the visa and admissibility requirements her application would have been denied. 429 U.S. at 26. The Supreme Court said that, "*[i]n these circumstances*" and in the absence of a direction from Congress, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief. *Id.* (emphasis added). That holding is inapplicable under the circumstances here, where Ms. Henry has not made such a concession and, to the contrary, has argued that if the IJ had found her statutorily eligible—and conducted the "extreme hardship" eligibility analysis that the

statute requires—the IJ could have reached a different result. (Pet. App. 170a-74a, 205a). Moreover, changes to the INA since *Bagamasbad* was decided, which have virtually eliminated judicial review of the agency's discretionary findings, have further undermined its applicability in the circumstances here. In particular, the Second Circuit's application of *Bagamasbad* to decline jurisdiction where the IJ proceeded directly to discretion without addressing statutory eligibility would improperly bar *any* judicial review even where there was constitutional or legal error in the eligibility analysis.

Thus, because the alternate grounds that the Second Circuit relied upon to dismiss the petition for review were inadequate, it was required to reach Ms. Henry's equal protection claim. The fact that the court of appeals failed to do so—notwithstanding Ms. Henry's raising it throughout the proceedings (Pet. App. 129a-130a, 165a-170a, 201a-03a)—does not militate against the grant of certiorari under either jurisdictional or prudential grounds. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("pure issue of law" was appropriate for Court's "immediate resolution" even though the court of appeals did not address the question); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (where the court of appeals had jurisdiction over the claim, it was "'appropriate for our immediate resolution' notwithstanding that it was not addressed by the Court of Appeals") (quoting *Nixon*, 457 U.S. at 743 n.23). As Justice Powell observed in *Nixon*, if certiorari were denied

because the court of appeals declined jurisdiction over a proper question, the court of appeals decision "would be insulated entirely from review by this Court." *Nixon*, 457 U.S. at 743 n.23. Where, as here, the court of appeals had jurisdiction and was required to address an issue that it did not address, that result would be inconsistent with the Supreme Court's jurisdiction as the court of last resort. *See id.* Moreover, as demonstrated below, the same and closely related equal protection issues have been previously addressed by several other courts of appeals, and the well-developed conflict is ripe for the Supreme Court's resolution.

I. THERE IS A RECURRING CIRCUIT SPLIT ON WHETHER THE ATTORNEY GENERAL MAY DISTINGUISH BETWEEN CLASSES OF LPRS UNDER INA SECTION 212(H)

For the reasons set forth below, the Court should grant a writ of certiorari in order to resolve Ms. Henry's equal protection claim because it presents a far-reaching question that is currently the subject of an inter-circuit conflict.

A. The BIA Has Made An Arbitrary Classification Between LPRs Who Are Applying For A Section 212(h) Waiver

Section 212(h)(1)(B) of the INA provides that an alien who would otherwise be inadmissible to the United States is eligible for a waiver of inadmissibility if she demonstrates that removal would result in "extreme hardship" to certain family

members who are either United States citizens or LPRs. *See* 8 U.S.C. § 1182(h), (Pet. App. 81a). Section 212(h)(1)(C) further provides that the Attorney General may condition waiver on the alien's concurrent application for adjustment of status. *See* 8 U.S.C. § 1182(h)(1)(C), (Pet. App. 81a). The BIA has extended the availability of Section 212(h) relief to LPRs charged with grounds of deportation. *See, e.g., Mendez-Moralez*, 21 I. & N. Dec. at 296, (Pet. App. 294a); Gordon, *Immigration Law* § 51.03[3].

Under the BIA's interpretation of the statute, a Section 212(h) waiver is available to LPRs charged with grounds of deportation in two scenarios: 1) where an LPR has departed and reentered the country subsequent to becoming deportable, a waiver may be granted *nunc pro tunc* to cure the LPR's inadmissibility at time of entry without need for an adjustment of status, *see In re Sanchez*, 17 I. & N. Dec. 218, 222-24 (BIA 1980), (Pet. App. 273a, 280a-81a); and 2) where an LPR, who has never left the United States, Section 212(h) relief from deportation may be granted but only if the LPR concurrently applies for adjustment of status, *see In re Parodi*, 17 I. & N. Dec. 608, 611-12 (BIA 1980) (Pet. App. 285a, 290a-91a)

Thus, if Ms. Henry (who fell within the second category) had left the country and been charged as deportable after she reentered, she would have been eligible for Section 212(h) relief without a concurrent application for adjustment of status. (Pet. App. 72a-73a). However, since Ms. Henry has never

left the country and did not file an application for adjustment of status, the agency held she was ineligible for a Section 212(h) waiver. (*Id.*). Ms. Henry submits that the agency's arbitrary distinction between two similarly situated classes of LPRs violates equal protection. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (equal protection guarantees apply to aliens as well as to United States citizens). Indeed, while courts have recognized that although "Congress [has the power] to create different standards of admission and deportation[,] . . . once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest." *Francis*, 532 F.2d at 273. Having applied Section 212(h) to LPRs charged with grounds of deportability—as opposed to solely inadmissibility—the agency may not permissibly hinge eligibility on "irrelevant and fortuitous factors" such as whether or not an LPR has left the country and returned. *See id.*; *see also F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (different classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

Indeed, under the BIA's own rulings, requiring an LPR to file for adjustment of status may be technically improper because an LPR's status does not change—and thus cannot be "adjusted"—until

there is a final order of removal. *See In re Lok*, 18 I. & N. Dec. 101 (BIA 1981), *aff'd*, *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982). The purpose of an adjustment of status application is to adjust the status of a nonimmigrant to that of an LPR.[6] Thus, an alien who is an LPR at the time removal proceedings commence, such as Ms. Henry, does not have to adjust her status. An application for adjustment of status for a deportable LPR would only create a legal fiction whereby she is "held to be in the same position as aliens presenting themselves at the border, seeking entry as [LPRs]." *Parodi*, 17 I. & N. Dec. at 611-12 (internal citations omitted), (Pet. App. 291a). Recognizing that an application for adjustment of status for an LPR serves no purpose other than to create this legal fiction, the BIA ruled that there was no rational reason to require a returning LPR to make a concurrent application for adjustment of status in order to be eligible for Section 212(h) relief. *See Sanchez*, 17 I. & N. Dec. at 222-24, (Pet. App. 280a-81a); *see also In re Abosi*, 24 I. & N. Dec. 204, 206-07 (BIA 2007), (Pet. App. 333a, 335a-38a). Likewise, there is no rational

[6] Historically, an alien applied for LPR status at the U.S. consulate office located in her home country (i.e., consular processing). *See* "Immigration Outline" Memorandum from the Court of Appeals for the Ninth Circuit, *Adjustment of Status* 1, *available at* http://www.ca9.uscourts.gov/ (last visited July 7, 2008). The alien would remain abroad until the application was approved, entering the United States for the first time as an LPR. *Id.* As more aliens came to the United States on temporary visas in the 1950s, Congress created the adjustment of status process to facilitate the LPR application for aliens already in the United States. *Id.*

basis why an LPR who has never left the United States and is charged with deportability should be required to file for adjustment of status when the same deportable LPR would not be required to do so if she had traveled abroad. *See Francis*, 532 F.2d at 273 ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time."). Ms. Henry submits that because the agency here held otherwise, her rights to equal protection were violated.

B. The Result Here Conflicts With The Law Of The Eleventh Circuit

The agency's decision here, which the Second Circuit left in place by dismissing the petition for review, directly conflicts with the law of the Eleventh Circuit, which held in *Yeung* that the identical distinction failed to meet rational basis review under equal protection. 76 F.3d at 341. In that case, the BIA found the petitioner ineligible for Section 212(h) relief because "it was a remedy reserved for exclusion proceedings." *Id.* at 338. The BIA reasoned that this waiver only applied in deportation contexts "in which the deportee had been able to file for adjustment of status, or the deportee has departed and returned to this country subsequent to his conviction for committing the deportable offense." *Id.* Thus, the BIA in *Yeung*, like the BIA here, found that the petitioner—who

could not apply for adjustment of status and who had not departed and returned to the United States—was ineligible to apply for Section 212(h) relief.

On appeal, the Eleventh Circuit reversed "[b]ecause of the Board's prior application of § 212(h) to deportation proceedings." *Id.* at 338-39. In particular, the court of appeals cited *Sanchez*, 17 I. & N. Dec. 218, (Pet. App. 273a), in which the BIA had found an LPR in deportation proceedings eligible for a Section 212(h) waiver because he had departed and reentered the country:

> To claim, as the INS does here, that [the petitioner] belongs to a different classification of persons simply by virtue of his failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary, and that is without a fair and substantial relation to the object of the legislation. . . . We find that [the petitioner] and Sanchez are similarly situated and deserving of similar treatment under the law. In particular, as deportable aliens they are equally deserving of waiver consideration by the Attorney General.

Yeung, 76 F.3d at 340 (citations and quotations omitted).

Notably, the Eleventh Circuit's decision in *Yeung* relied on the Second Circuit's earlier decision in *Francis*. *See Yeung*, 76 F.3d at 340-41 (citing *Francis*, 532 F.3d at 269). In *Francis*, the Second Circuit

examined INA Section 212(c), a provision that, like Section 212(h), was intended to provide an opportunity for the Attorney General, in his discretion, to waive certain grounds of inadmissibility for aliens seeking entry into the United States. *See Francis*, 532 F.2d at 272 (noting Congress's concern that "there be some degree of flexibility to permit worthy returning aliens to continue their relationships with family members in the United States despite a ground of exclusion"). As with Section 212(h), the agency had applied Section 212(c) to deportable aliens, based on its realization "that these considerations apply with equal force to an alien who has already reentered." *Id.* The Second Circuit held that once the benefits of this statute were available to deportable LPRs, the government could not make eligibility for such benefits hinge on random factual distinctions such as whether or not the alien had traveled outside of the country. *Id.* at 273 ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").[7] The equal protec-

[7] The rule in *Francis* was also adopted by the BIA in *In re Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976):

> In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens. We further conclude that permanent resident aliens similarly situated shall be treated equally with respect to their applications for discretionary relief under Section 212(c) of the Act.

tion holding under Section 212(c) in *Francis* has been adopted by every court of appeals that has directly addressed the same issue. *See Katsis v. INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 948-49 (7th Cir. 1993); *Butros v. INS*, 990 F.2d 1142, 1143 (9th Cir. 1993) (*en banc*); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992); *Campos v. INS*, 961 F.2d 309, 313 (1st Cir. 1992); *Vissian v. INS*, 548 F.2d 325, 328 n.3 (10th Cir. 1977).

Moreover, in 2007, the Second Circuit reaffirmed the core equal protection holding embodied by *Francis* in *Blake v. Carbone*. 489 F.3d at 104. In *Blake*, the petitioner was deportable for having committed an aggravated felony and sought 212(c) relief. *Id.* at 91-92. The BIA held that Section 212(c) relief was available only to aliens charged with a ground of deportability that had a statutory counterpart as a ground of inadmissibility. *Id.* at 92. Therefore, the BIA found that the petitioner was ineligible for Section 212(c) relief because the commission of an aggravated felony is not an enumerated basis of inadmissibility. *Id.* In reversing the BIA, the Second Circuit held that an LPR "is eligible for a § 212(c) waiver if his or her particular aggravated felony offense could form the basis of exclusion under § 212(a) as a crime of moral turpitude." *Id.* at 104. In so holding, the court of appeals stated that it is "bound by *Francis's* mandate to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous

factors, be treated in a like manner.'" *Id.* (quoting *Francis*, 532 F.2d at 273).

Unlike *Francis*, the logic of *Blake* has not been greeted with near uniform adoption by other circuits that have passed on the same question. To the contrary, other circuits have split with the Second Circuit on the *Blake* issue, which has the same jurisprudential underpinnings as the issue at stake here. *See, e.g.*, *Caroleo v. Gonzales*, 476 F.3d 158, 164-68 (3d Cir. 2007); *Valere v. Gonzales*, 473 F.3d 757, 767 (7th Cir. 2007); *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007); *Vue v. Gonzales*, 496 F.3d 858, 860-62 (8th Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) (*per curiam*). This further well-developed split among courts of appeals on the meaning of equal protection in the context of INA Section 212 underscores the need for the Supreme Court to grant certiorari and decide "a uniform rule on the point." *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962).

C. The Seventh Circuit Is Also Part Of The Circuit Split

Not only is the Eleventh Circuit's holding in *Yeung* incompatible with the decision below here, as well as the courts of appeals cases applying *Francis*, but it also directly conflicts with law of the Seventh Circuit. In *Klementanovsky*, the Seventh Circuit held that limiting Section 212(h) relief to inadmissible—as opposed to deportable—aliens did not violate equal protection. 501 F.3d at 792-93. In

that case, an LPR who had not departed and returned to the United States was charged with criminal grounds of deportation and applied for a Section 212(h) waiver. *Id.* at 790-91. The IJ found that such waivers only applied to "proceedings where an alien seeks admission, or to circumstances where the applicant is assimilated to the same position as an alien seeking admission [i.e. an alien applying for adjustment of status]." *Id.* at 790. Finding that the petitioner was neither applying for admission or adjustment of status, "but rather relief from deportation," the IJ denied his Section 212(h) waiver. *Id.*

On appeal to the Seventh Circuit, the petitioner argued that "by drawing a line between deportable criminal aliens who have left the country and returned, and those who have stayed and applied for a Section 212(h) waiver directly, Congress and the BIA have denied him his right to equal protection of the laws." *Id.* at 791. In holding that this distinction did not violate equal protection, the Seventh Circuit criticized the Eleventh Circuit in *Yeung* for not addressing why Congress might have had a rational basis for distinguishing between inadmissible and deportable aliens. *Id.* at 793.[8] In

8 In fact, the relevant distinction in *Klementanovsky*, like in *Yeung*, was not between inadmissible and deportable aliens but between two classes of deportable aliens—LPRs who had left the United States and reentered and LPRs who had never left the country. Thus, although the Seventh Circuit criticized *Yeung* and said that *Francis* was inapplicable, *Klementanovsky* also involved "'the government [] taking the irrational position that an alien who after coming to the United

addition, the Seventh Circuit stated that to the extent the *Yeung* decision "was based on a concern about 'international travelers' receiving preferential treatment," the BIA's decision in *Klementanovsky* showed that the "BIA appears to have backed away from that interpretation of the INA that previously allowed § 212(h) waivers to some aliens who left the country and returned." *Id.* at 793.[9]

States had taken a trip abroad and returned and was then ordered deported was entitled to more consideration than one who had never taken a foreign trip after coming to the United States.'" 501 F.3d at 793 (citing *Francis*, 532 F.2d 268; *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)).

[9] Similarly, in *Malagon de Fuentes v. Gonzales*, the Fifth Circuit rejected a petitioner's equal protection claim related to her eligibility for a Section 212(h) waiver. 462 F.3d 498 (5th Cir. 2006). Upon attempted reentry, the petitioner LPR was charged with inadmissibility on the basis of a crime of moral turpitude, and the IJ held her ineligible for a Section 212(h) waiver because she had not been continuously present in the United States for seven years before she was placed in proceedings. She argued that INA Section 101(a)(13) was unconstitutional as applied to her because there was "no rational basis to distinguish between LPRs who have committed offenses under § 1182(a)(2) [criminal grounds of inadmissibility] and left the country briefly and those who have also committed the offenses and not left." *Id.* at 503. In rejecting this argument and finding that the decision survived rational basis scrutiny, the Fifth Circuit noted that it had refused to further extend the logic of *Francis*. *Id.* at 505.

D. The Circuit Split Is On An Issue Of Vital Importance

The circuit split on whether equal protection requires the BIA to treat similarly situated LPRs in the same manner is an issue that impacts thousands of individuals. The Supreme Court has consistently recognized that the exercise of executive and congressional immigration power is subject to important limitations by the Court. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress's immigration power "is subject to important constitutional limitations"); *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (congressional authority limited "by the [C]onstitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). Here, there are likely thousands of LPRs like Ms. Henry, who have never left the country after their legal admission and subsequently seek a waiver of deportation. Many of these LPRs (who may have continuously spent decades in the United States) will be unable to file an application for adjustment of status. Allowing some LPRs in deportation proceedings—those who have left the country and reentered—to apply for a Section 212(h) waiver without a concurrent application for adjustment of status while imposing the requirement on other LPRs in deportation proceedings—those like Ms. Henry who have never left the country—bears no relation to Congress's legislation and serves no rational purpose.

The decision below here split with the Eleventh Circuit's decision in *Yeung*, which had correctly held that the classification at issue is "a distinction that can only be characterized as arbitrary." 76 F.3d at 340. Addressing the split of authorities and correcting the Second Circuit's decision is worthy of certiorari.

II. THE SECOND CIRCUIT WAS REQUIRED TO ADDRESS MS. HENRY'S EQUAL PROTECTION CLAIM BECAUSE IT HAD JURISDICTION OVER THE ISSUE

The Supreme Court should grant certiorari to address the equal protection issue outlined above because, although the Second Circuit did not explicitly address the question, it was required to do so. Indeed, the discretionary determination of the agency necessarily was predicated on a resolution of that issue adverse to petitioner.

A. Section 212(h) Requires A Determination On "Extreme Hardship"

Section 212(h) provides that a waiver of inadmissibility may be granted if "the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien." INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B), (Pet. App. 81a). After making a determination on extreme hardship, the IJ may exercise his discretion whether to grant the waiver. *See* INA § 212(h)(1)(C), 8 U.S.C. § 1182(h). The BIA has said "[e]xtreme hardship is

a requirement of eligibility, but once established it is but one favorable discretionary factor to be considered." *See Mendez-Moralez*, 21 I. & N. Dec. at 301, (Pet. App. 302a). Thus, a determination on extreme hardship is a necessary statutory component to the subsequent application of the agency's discretion. Under these circumstances, an IJ cannot pretermit the extreme hardship determination under Section 212(h) because it was Congress's intent, as recognized by the BIA, that the balance of the equities should include the result of the extreme hardship analysis.

Here, the agency held that, even if Ms. Henry were statutorily eligible for Section 212(h) relief, it would deny the waiver as a matter of discretion based on the exact same discretionary weighing that occurred under Section 240A(a), a statute that does not have an "extreme hardship" component. 8 U.S.C. § 1229b(a). (Pet. App. 82a-83a). The Second Circuit relied on this holding to assert that it lacked jurisdiction to review the decision because it was based on a discretionary finding. (Pet. App. 5a-6a). However, as Ms. Henry argued below, (Pet. App. 170a-75a, 203a-06a), the agency had committed legal error under the statute because it had skipped the prerequisite step of making a determination on "extreme hardship," which is inextricably intertwined with the balance of the equities. *See Mendez-Moralez*, 21 I. & N. Dec. at 301, (Pet. App. 302a). The court of appeals plainly had jurisdiction over this legal question. *See* INA § 242(a), 8 U.S.C. § 1252(a), (Pet. App.

86a-87a) (court of appeals has sole jurisdiction over "constitutional claims or questions of law" raised in a petition for review); *Nguyen v. Chertoff*, 501 F.3d 107, 111 (2d Cir. 2007) ("The phrase 'questions of law' encompasses, *inter alia*, questions of statutory interpretation. Among such questions are an alien's statutory eligibility for removal and relief from removal.") (internal citations omitted).

Although the agency relied upon its separate analysis denying Ms. Henry's application for a cancellation of removal under Section 240A(a), that statute does *not* include hardship as an eligibility requirement. *See* 8 U.S.C. 1229b(a), (Pet. App. 82a-83a). Rather, the IJ observed under the Section 240A(a) discretionary analysis that Ms. Henry's five American citizen daughters would suffer "hardship," as well as "severe" hardship, if she were removed, but that the hardship did not outweigh other Section 240A(a) factors. (Pet. App. 66a-67a). In holding that it lacked jurisdiction, the Second Circuit relied upon this discussion in the Section 240A(a) context to conclude that some hardship was considered. (Pet. App. 5a-6a). However, the IJ's discussion in the cancellation of removal context under INA Section 240A(a), as discussed immediately below, was no substitute for addressing extreme hardship under INA Section 212(h).

As an initial matter, the "severe" hardship standard considered by the IJ is not a standard contemplated by the provisions of the INA. That

Congress intentionally chose specific levels of hardship for particular forms of relief from removal therefore belies the Second Circuit's conclusion that the IJ's consideration of hardship or "severe" hardship, in the context of cancellation of removal, was the equivalent of a determination of "extreme hardship" under Section 212(h). *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there'"). Indeed, the Supreme Court has affirmed that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004). Even if "severe" hardship had some legal significance, an IJ may not import findings from one application for relief from removal in order to "fill the gap" in another, as the Seventh Circuit correctly held in *Bastanipour*, 980 F.2d at 1130-31. Thus, the IJ's finding of "severe" hardship in the context of Ms. Henry's cancellation of removal application did not satisfy his obligation to address "extreme hardship" under INA Section 212(h) prior to balancing the equities. Likewise, the Second Circuit should not have relied on this analysis to hold that the agency had sufficiently considered hardship, (Pet. App. 5a-6a), when it had not made a determination on "extreme hardship."

In sum, the agency was not free to exercise its discretion in denying Ms. Henry's Section 212(h) application prior to making a specific determination on "extreme hardship," and thus the Second Circuit had jurisdiction to reverse the IJ's legal error in proceeding directly to the discretionary analysis. Thus, the Second Circuit was required to address Ms. Henry's equal protection claim because there were no alternate adequate grounds to dismiss her petition for review.

B. *Bagamasbad* Is Inapposite

The Second Circuit denied Ms. Henry's petition because it treated her argument with respect to extreme hardship as going to the agency's discretion. To be clear, Ms. Henry did not argue below—and does not argue here—that the agency made an error as a matter of discretion. (Pet. App. 197a-200a). Rather, as outlined above, she argued that the IJ made an error as a matter of law by proceeding to the discretionary analysis without first making a determination on extreme hardship. Under the BIA's precedent, that required finding, if established, would have changed the subsequent balance of the equities in Ms. Henry's favor.

In holding that it lacked jurisdiction over Ms. Henry's "extreme hardship" argument, the Second Circuit relied on *INS v. Bagamasbad*, which stated that "absent an express statutory requirement" to the contrary, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief. (Pet. App.

5a) (citing 429 U.S. 24, 25 (1976) (*per curiam*)).[10] However, the Supreme Court's *per curiam* decision in that case is not applicable to the circumstances here.

Bagamasbad involved an alien who had overstayed her visa and applied for adjustment of status. 429 U.S. at 24. It was "conceded that [her] application would have been properly denied whether or not she satisfied the statutory eligibility requirements." *Id.* at 26. The court of appeals had held that the IJ was nevertheless required to address statutory eligibility before denying the application as a matter of discretion. The Supreme Court, noting the concession that the alien's application would not be granted, held that: "*In these circumstances*, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility." *Id.* (emphasis added).

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[10] Despite relying on *Bagamasbad*, the Second Circuit also stated that "Henry does not argue that the BIA erred by failing to determine her statutory eligibility for section 212(h) relief." (Pet. App. 5a). In fact, Ms. Henry argued that the agency incorrectly addressed statutory eligibility in two ways: 1) the agency incorrectly held her to be ineligible for a Section 212(h) waiver as a result of her particular LPR classification, *see supra*, Point.I, and 2) it also erred by denying the application as a matter of discretion because Section 212(h) mandates that the agency address the statutory eligibility requirement of "extreme hardship" before turning to any discretionary factors.

Here, Ms. Henry has not conceded that her application would be denied as a matter of discretion if the IJ had conducted the proper "extreme hardship" analysis. Indeed, unlike in *Bagamasbad*—where the statutory requirements at issue were whether the alien could obtain a visa—the BIA has said here that the statutory eligibility requirement of extreme hardship overlaps with the discretionary factors. *See Mendez-Morales*, 21 I. & N. Dec. at 301, (Pet. App. 302a). Ms. Henry has argued throughout that the agency's decision on her Section 212(h) waiver might have reached a different result had it found her otherwise eligible and addressed the issue of extreme hardship that, if established, would have then been considered in the balance of equities. *Cf. Bastanipour*, 980 F.2d at 1130-31 (remanding the BIA's denial of asylum, notwithstanding its findings concerning the denial of an alternative application for Section 212(c) relief, because the balancing of factors might be determined differently had the BIA made explicit findings on the statutory asylum issues).

Finally, *Bagamasbad* is also distinguishable because it was decided before recent changes to the INA that have restricted judicial review of the Attorney General's decisions to "constitutional claims or questions of law raised upon a petition for review." INA § 242(a), 8 U.S.C. § 1252(a), (Pet. App. 86a). Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") Congress amended the INA to preclude judicial review of the discretionary findings of the agency

in the context of all forms of relief from removal with the exception of grants of asylum. Pub. L. No. 104-208, 110 Stat. 3009, 3009-607 (codified as amended at 8 U.S.C. § 1252(a)(2)(B)(ii), (Pet. App. 85a-86a). Prior to this amendment, courts of appeal reviewed discretionary determinations in immigration cases under an abuse of discretion standard. *See, e.g., Foti v. INS*, 375 U.S. 217, 228 (1963); *see also* Gordon, *Immigration Law* § 104.09. In that earlier context, permitting an IJ to proceed directly to a discretionary analysis and forego questions of statutory eligibility did not implicate the same concerns because the discretionary determinations were still reviewable.

The application of *Bagamasbad* to a case where an agency's discretionary determination is not subject to review means that if the agency is able to forego the statutory eligibility analysis, the entire application is rendered unreviewable—even when the petitioner's constitutional rights may have been violated. Such a result is inconsistent with the INA, which has conferred jurisdiction on courts to review constitutional claims and legal questions.[11] It is also inconsistent with basic principles

[11] Indeed, the outcome is incompatible with Congress's intent when it enacted the provisions of the REAL ID Act of 2005, which explicitly "restored the jurisdiction of the courts to review [applications for discretionary relief from removal] . . . to the limited extent that the petition for review of such decisions raises a constitutional claim of a question of law." *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324 (2d Cir. 2006); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302 (codified at 8 U.S.C. § 1252(a)(2)(D), (Pet. App. 86a).

of due process because it shields the agency with the unreviewable power to render decisions that may infringe on a petitioner's constitutional rights even where, as here, the agency purports to lack jurisdiction to address constitutional violations itself. *See St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there be opportunity to have some court decide whether [an agency applied] an erroneous rule of law . . . ."); (*cf.* Pet. App. 73a) ("agency cannot rule on the constitutionality of laws enacted by Congress").

In sum, the Second Circuit wrongly relied on *Bagamasbad* under the circumstances here. Accordingly, the court of appeals was required to reach the equal protection claim. Because it did not do so, it has contributed to a conflict among the circuits on the issue.

C. The Second Circuit's Failure To Address The Equal Protection Issue Does Not Preclude This Court's Review

Under the INA, the appropriate court of appeals is the "sole and exclusive" forum for judicial review of constitutional claims and legal questions raised by an order of removal. *See* INA § 242(a), 8 U.S.C. § 1252(a). (Pet. App. 86a-88a). Here, the Second Circuit did not reach the equal protection issue.[12]

[12] There was absolutely no issue of waiver of the argument or procedural default.

However, for the reasons discussed above, the court of appeals relied on inadequate alternate grounds in dismissing Ms. Henry's petition, and thus it was in fact required to address Ms. Henry's constitutional claim.

The fact that the lower court did not address the equal protection issue does not preclude Supreme Court review of the question. *See Mitchell*, 472 U.S. at 530 ("purely legal question" is reviewable "notwithstanding that it was not addressed by the Court of Appeals"); *cf. United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'"). To the contrary, the lack of any meaningful federal court review of a constitutional claim—notwithstanding the fact that the issue was repeatedly raised by Ms. Henry below, (Pet. App. 129a-130a, 165a-170a, 201a-03a)—favors review by this Court because, if certiorari were not granted, the agency's decision and the constitutional issue "would be insulated entirely from review." *Nixon*, 457 U.S. at 743 n.23. That result would not comport with basic principles of due process, which at base require a meaningful opportunity to be heard, including where a court of appeals fails to address an issue that it was in fact required to address. Indeed, in *Mitchell* the Court held that, although the court of appeals did not address a "purely legal question" within its jurisdiction, the issue was "appropriate for [the Supreme Court's] immediate resolution." 472 U.S. at 530.

Finally, as demonstrated above, notwithstanding the Second Circuit's failure to address the equal protection claim made by Ms. Henry, the same issue has been well developed at the court of appeals level. Indeed, there are at least fifteen published circuit court decisions on the equal protection issue here and the related *Francis* issue both under INA Section 212, with various splits on whether equal protection allows the agency to distinguish between deportable LPRs based on whether or not they have left the United States. *See supra*, Point I.B. Thus, it is clear that the constitutional issue at stake is ripe for this Court's review without delay.

CONCLUSION

For the foregoing reasons, Ms. Henry respectfully submits that her petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

JENNY LEE HENRY, a/k/a Karen Allen, a/k/a Karen Henry, a/k/a Annette Williams, a/k/a Andrea Scantlebury, a/k/a Williams Sherlly, a/k/a Jennylee Henry, a/k/a Lorna Williams, a/k/a Sharon Smith, a/k/a Jennymary Henry, a/k/a Shelly Williams, a/k/a Williams,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General of the United States,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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Counsel of Record
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* Attorney General Michael B. Mukasey was automatically substituted below as the respondent for the former Attorney General, Alberto Gonzales, under Federal Rule of Appellate Procedure 43(b)(2).

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of February, two thousand and eight.

Present: ROSEMARY S. POOLER,
DEBRA ANN LIVINGSTON,
Circuit Judges,
LEWIS A. KAPLAN,[1]
District Judge.

07-1884-ag

JENNY LEE HENRY, also known as KAREN ALLEN, also known as KAREN HENRY, also known as ANNETTE WILLIAMS, also known as ANDREA SCANTLEBURY, also known as WILLIAMS SHERLLY, also known as JENNYLEE HENRY, also known as LORNA WILLIAMS, also known as SHARON SMITH, also known as JENNYMARY HENRY, also known as SHELLY WILLIAMS, also known as WILLIAMS,

Petitioner,

– v –

---

[1] Hon. Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL of the UNITED STATES,[2]

Respondent.

Appearing for Petitioner:

Tanisha L. Massie, Cleary Gottlieb Steen & Hamilton LLP, New York, New York.

Appearing for Respondent:

Sarah Maloney, Office of Immigration Litigation, U.S. Department of Justice, Washington, D.C.

SUMMARY ORDER

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is DENIED.

Jenny Lee Henry seeks review of a final order of the BIA, issued April 26, 2007, dismissing her appeal of an immigration judge's ("IJ") decision ordering her removed. Henry conceded removability and seeks review of the BIA's discretionary denial of her applications for cancellation of

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[2] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Anthony Gonzales as the respondent in this case.

removal under Section 240A of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b, and for a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h). Because we conclude that we lack jurisdiction to review her claims, we dismiss the petition. We assume the parties' familiarity with the underlying facts and procedural history in this case.

When, as here, the BIA adopts the decision of the IJ and supplements and revises the IJ's decision, we review the decision of the IJ as supplemented and revised by the BIA. *See Ming Xia Chen v. BIA*, 435 F.3d 141, 144 (2d Cir. 2006).

In general, we lack jurisdiction to review the agency's denial of an application for cancellation of removal. *See Barco-Sandoval v. Gonzales*, 496 F.3d 132, 135 (2d Cir. 2007) ("[T]he BIA's discretionary determinations concerning whether to grant cancellation of removal constitute 'judgment[s] regarding the granting of relief under . . . section 1229b' within the meaning of 8 U.S.C. § 1252(a)(2)(B)(i) and therefore the review of such determinations falls outside our jurisdiction.") (internal citations omitted). Similarly, we lack jurisdiction to review "any judgement regarding the granting of relief under section 1182(h)." 8 U.S.C. § 1252(a)(2)(B)(i). However, with respect to both types of application, we retain jurisdiction to review "constitutional claims or questions of law." *Id.* § 1252(a)(2)(D); *see Noble v. Keisler*, 505 F.3d 73, 77 (2d Cir. 2007). Accordingly, Henry frames her claims as raising constitutional questions and other questions of law.

To determine whether we retain jurisdiction under section 1252(a)(2)(D) to review challenges to the agency's exercise of discretion, we must "study the arguments asserted . . . to determine, regardless of the rhetoric employed in the petition, whether it merely quarrels over the . . . justification for the discretionary choices, in which case [we] . . . lack jurisdiction, or whether it instead raises a 'constitutional claim' or 'question of law'" in which case we retain jurisdiction to review those particular issues. *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006).

Henry first argues that the agency committed legal error by failing to determine whether her removal would create an "extreme hardship" for her family. Although "extreme hardship" is a statutory prerequisite to section 212(h) relief, Henry does not argue that the BIA erred by failing to determine her statutory eligibility for section 212(h) relief. *See INS v. Bagamasdad*, 429 U.S. 24, 25 (1976) (per curiam) ("[A]bsent an express statutory requirement" to the contrary, the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief). Henry's complaint, rather, is that under BIA precedent. extreme hardship, "once established . . . is [a] favorable discretionary factor to be considered." *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (BIA 1996). Thus, Henry argues that the agency was required to determine whether her removal would create an extreme hardship to her family in order to weigh all the relevant equities. The agency, however, expressly considered the

hardship her family would suffer. *See, e.g., In re Jenny Lee Henry*, No. A38 619 316, at 17 (Immig. Ct. N.Y. City Dec. 9, 2005) ("There is strong evidence that the Respondent and her family, including her five minor U.S. citizen children and her mother, would suffer hardship if removal occurs."). Henry's complaint, therefore, is that the agency did not give her hardship enough weight in balancing the equities. This is a claim over which we lack jurisdiction. *See Xiao Ji Chen*, 471 F.3d at 332 (noting that we lack jurisdiction to review a challenge to "the balancing of factors in which discretion was exercised").[3]

Second, Henry argues that the agency placed too much weight on her recent arrests in determining that she was not rehabilitated. Henry does not contend that agency, as a matter of law, is precluded from considering her arrests. Rather, Henry contends that the agency erred by giving her arrests "substantial weight." *See In re Arreguin*, 21 I & N. Dec. 38, 42 (BIA 1995) (noting the Board's hesitance "to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations"). Because this argument asks us to

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[3] *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992), is not to the contrary. In *Bastanipour*, the BIA's decision was reviewable for abuse of discretion, "the Board gave no reasons for its discretionary determination," and the BIA "assumed that [the petitioner] lacked a well-founded fear of persecution." *Id.* at 1131. Here, review is precluded by a jurisdictional bar, and the agency explicitly discussed, and accounted for, the hardship to her family. Henry's quarrel, therefore, is with the agency's balancing of the equities, which we lack jurisdiction to review.

review the amount of weight that the BIA placed on the arrests, we lack jurisdiction to review the merits of the argument. Henry contends also that the IJ erred by assuming that her arrests might lead to imprisonment and abandonment of her children. We need not decide whether the alleged error would amount to an error of law because the BIA specifically disavowed this interpretation of the IJ's holding. Thus, in balancing the equities, the BIA—whose decision we review—clearly did not rely on this alleged error. *See Noble*, 505 F.3d at 78 ("The discretionary portion of an IJ's decision is . . . reviewed by the BIA as though it were deciding the issue in the first instance.").

Finally, Henry argues that the BIA erred by placing weight on her refusal to accept guilt for some of her past convictions in determining that she was not rehabilitated. In support of the proposition that the agency may not so rely, Henry cites a decision from the Seventh Circuit, which, reviewing for abuse of discretion, held that a refusal to acknowledge guilt regarding convictions cannot alone negate a finding of rehabilitation. *See Guillen-Garcia v. INS*, 999 F.2d 199, 204-5 (7th Cir. 1993). Because the BIA did not rely solely on Henry's refusal to accept responsibility for her past crimes, *Guillen-Garcia* is inapposite.

For the foregoing reasons, the petition for review is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
at Foley Square
40 Centre Street, New York, N.Y. 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

[UPPER LEFT COLUMN]

Docket Number(s): 07-1884-ag

Motion for: Stay of issuance of the mandate pending filing petition for certiorari

Set forth below precise, complete statement of relief sought:

Stay of issuance of the mandate pending the filing of a petition for a writ of certiorari with the Supreme Court of the United States. 28 U.S.C. § 2101(f); Fed. R.App. P 41(d)(2)

[UPPER RIGHT COLUMN]

Caption [use short title]

Henry v. Mukasey

[oval stamp of
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
MAY 30 2008
Catherine O'Hagan Wolfe, Clerk]

[LEFT COLUMN CONT'D]

MOVING PARTY: Jenny Lee Henry

☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Lindsee P. Granfield
[name of attorney, with firm, address, phone number and e-mail]

Cleary Gottlieb Steen & Hamilton LLP
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New York, NY 10006
(212) 225-2000
lgranfield@cgsh.com

[RIGHT COLUMN CONT'D]

OPPOSING PARTY: Michael B. Mukasey, Attorney General of the United States

OPPOSING ATTORNEY: [Name] Sarah Maloney
[name of attorney, with firm, address, phone number and e-mail]

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 878 Ben Franklin Station
Washington, D.C. 20044
(202) 305-2129 sarah.maloney@usdoj.gov.

Court-Judge/Agency appealed from:

Board of Immigration Appeals

[LEFT COLUMN CONT'D]

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? ☐ Yes ☑ No
B. been obtained? ☐ Yes ☑ No

Is oral argument requested? ☐ Yes ☑ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No
If yes, enter date _____

[RIGHT COLUMN CONT'D]

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this Court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

_____

_____

Has service been effected? ☑ Yes ☐ No

[LEFT COLUMN CONT'D]

Signature of Moving Attorney:

/s/ Lindsee P. Granfield Date: May 30, 2008

ORDER

Before: Hon. Rosemary S. Pooler, Hon. Debra Ann Livingston, *Circuit Judges* and Hon. Lewis A. Kaplan, *District Judge**

IT IS HEREBY ORDERED that Petitioner Henry is GRANTED a 30-day stay of the mandate. If a certiorari petition is filed within 30 days, the stay is extended until the Supreme Court disposes of the certiorari petition.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
by

/s/ JOY FALLEK
Joy Fallek, Administrative Attorney

[oval stamp of
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JUNE 10 2008
Catherine O'Hagan Wolfe, Clerk]

Date

* Honorable Lewis A. Kaplan, United States District Court for the Southern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF THE COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of May two thousand and eight,

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ORDER No. 07-1884-ag
FILED MAY 23, 2008
[OVAL STAMP]

Jenny Lee Henry, also known as Karen Allen, also known as Karen Henry, also known as Annette Williams, also known as Andrea Scantlebury, also known as Williams Sherlly, also known as Jennylee Henry, also known as Lorna Williams, also known as Sharon Smith, also known as Jennymary Henry, also known as Shelly Williams, also known as Williams,

Petitioner,

v.

Michael B. Mukasey,
Attorney General of the United States,*

Respondent.

Jenny Lee Henry having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: FRANK PEREZ
Frank Perez, Deputy Clerk

---

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto Gonzales as the respondent in this case.

[ROUND STAMP]

U.S. Department of Justice

Executive Office for
Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
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Kenneth Juan Figueroa, Esq.
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New York, NY 10014

Name: HENRY, JENNY LEE

A38-619-316

Date of this Notice:
04/26/2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A38 619 316 -
New York City

Date: [STAMP]
APR 26, 2007

In re: JENNY LEE HENRY a.k.a. Karen Allen a.k.a. Karen Henry a.k.a. Annette Williams a.k.a. Andrea Scantlebury a.k.a. Williams Sherlly a.k.a. Jennylee Henry a.k.a. Lorna Williams a.k.a. Sharon Smith a.k.a. Jennymary Henry a.k.a. Shelly Williams a.k.a. Williams

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kenneth Figueroa, Esquire

ON BEHALF OF DHS:
Anne E. Gannon
Assistant Chief Counsel

REISSUED DECISION

Due to an apparent error in administrative proceeding of the Board's January 19, 2007, decision in this case, the decision will be reissued and treated as if entered on today's date. In light of our decision to reissue the Board's previous order in this case, the respondent's stay request is moot.

ORDER: The Board's decision dated January 19, 2007, attached here to, is hereby reissued and shall be treated as entered as of today's date.

/s/ FREDERICK D. HESS
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A38 619 316 -
New York City

Date: [STAMP]
JAN 19, 2007

In re: JENNY LEE HENRY a.k.a. Karen Allen a.k.a. Karen Henry a.k.a. Annette Williams a.k.a. Andrea Scantlebury a.k.a. Williams Sherlly a.k.a. Jennylee Henry a.k.a. Lorna Williams a.k.a. Sharon Smith a.k.a. Jennymary Henry a.k.a. Shelly Williams a.k.a. Williams

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kenneth Figueroa, Esquire

ON BEHALF OF DHS:
Anne E. Gannon
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act
[8 U.S.C. § 1227(a)(2)(a)(ii)]-
Convicted of two or more crimes
involving moral turpitude

APPLICATION: Waiver of inadmissibility under section 212(h); cancellation of removal under section 240A(a)

The respondent's application for cancellation of removal under section 240(a) of the Act, 8 U.S.C. § 1229(a), was initially denied on December 12, 2000, by an Immigration Judge who found the respondent to be statutorily ineligible for the requested relief. The respondent appealed the denial and we summarily affirmed the Immigration Judge's decision on March 23, 2001. The respondent then filed a motion to reconsider, which we denied on May 15, 2001. The respondent thereafter filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of New York. The District Court determined that the respondent's application for cancellation of removal had been denied due to an impermissible retroactive application of the stop-time rule found at Section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1). It therefore granted her petition on November 30, 2001, and remanded the record to allow the respondent to reapply for cancellation of removal as well as apply for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(n).

Pursuant to the District Court's order, we vacated our prior orders in a decision dated June 10, 2002, and remanded the record to the Immigration Judge for further proceedings. After conducting lengthy hearings spanning nearly 3 years, in a decision dated December 9, 2005, the Immigration Judge determined that the respondent did not merit cancellation of removal as a matter of discretion. He also found that she was statutorily ineligi-

ble for a waiver of inadmissibility under section 212(h) of the Act and that, irrespective of statutory eligibility, she did not merit such a waiver in the exercise of discretion. The Immigration Judge therefore ordered the respondent removed to Guyana. The respondent's appeal from the Immigration Judge's December 9, 2005, decision is presently before us. The appeal will be dismissed.

The respondent has an extensive criminal record that began in 1987 and continued throughout her removal proceedings, including convictions for petit larceny, endangering the welfare of a child, and felony burglary. *See* I.J. at 2, 8-13, 16-20; Exhs. 1, 3, 8, 17, 20, 27-29. On appeal, the respondent argues that the Immigration Judge erred in determining that she did not warrant a discretionary grant of cancellation of removal under section 240A(a) of the Act, notwithstanding her criminal record. Specifically, she asserts that in balancing the relevant positive and negative factors, the Immigration Judge gave insufficient weight to the hardship the respondent's United States citizen and lawful permanent resident family members would face upon the respondent's return to Guyana. We disagree, and find that the Immigration Judge properly considered the hardship that the respondent's family will likely face when she is removed from the United States, including emotional and economic challenges as well as possible medical difficulties in relation to the eczema one of her daughters suffers. *See* I.J. at 17. Moreover, the respondent's contention that the

Immigration Judge found that "appropriate treatment for her [daughter's] condition is unlikely to be reasonably accessible in Guyana" is not supported by the record.[1] *Id.* In addition, we note that although the respondent alleges that her United States citizen daughter has a serious medical condition, the record is devoid of any medical or other documentary evidence regarding the seriousness of her condition. *See* Exh. 7R; Tr. at 74.

The respondent also asserts on appeal that she has been rehabilitated and will no longer engage in criminal behavior. We are unconvinced by her arguments for the same reasons cited by the Immigration Judge. *See* I.J. at 17-19 and cases cited therein. We also find that the Immigration Judge properly considered the respondent's lack of rehabilitation when weighing the equities in her favor against the factors demonstrating her undesirability as a lawful permanent resident of the United States. *Id.* In addition, we disagree with the respondent's contention that the Immigration Judge did not consider the rehabilitative qualities

[1] The respondent contends that the Immigration Judge's acknowledgment of such an inaccessibility of appropriate treatment is memorialized at page 17 of the transcript. *See* Respondent's Brief at 14. However, it appears that she intended to cite page 17 of the Immigration Judge's opinion, as page 17 of the transcript does not contain information relevant to this allegation of error. *See* I.J. at 17; Tr. at 17. The record reveals that the Immigration Judge did in fact acknowledge that the level of medical treatment available to the respondent's daughter would likely be inferior in Guayana, but he did not find that appropriate medical treatment would likely be inaccessible to her. *See* I.J. at 17.

of the Shoplifters Alternative program she completed in 2004 and erroneously compared it to the program she completed while in Department of Homeland Security ("DHS") custody. The Immigration Judge clearly took into account the respondent's testimony regarding the Shoplifters Alternative program and the reasons why she believed it assisted in her rehabilitation more than the DHS program had. *See* I.J. at 9. Nevertheless, she remained unconvinced that the Shoplifters Alternative program had led to her rehabilitation, particularly because after completing the course she was arrested multiple times in relation to various charges, including petit larceny. *Id. See also* I.J. at 17-19; Exhs. 12, 27-28.

While we find that the Immigration Judge's ultimate determination regarding the respondent's lack of rehabilitation is sustainable, we do agree with the respondent that the record does not support the Immigration Judge's statement that the respondent continued to establish a pattern of arrests *and convictions* after completing the Shoplifters Alternative course. *See* I.J. at 18. The record reflects multiple arrests and pending charges, but no convictions, between the respondent's completion of the course and the date of her last removal hearing. *See* Exhs. 3, 27-29. We find the Immigration Judge's misstatement to be harmless error, however, as the record fully supports his finding that the respondent's rehabilitative efforts were insufficient, considering her long criminal record, her felony conviction shortly before com-

pleting the Shoplifters Alternative program, and her multiple arrests thereafter. *Id. See also* I.J. at 17-19. Moreover, notwithstanding the respondent's contention to the contrary, the Immigration Judge did not place undue emphasis on the recent arrests and charges pending against the respondent at the time he rendered his decision, much less allow such unresolved charges to "nullify" the equities in the respondent's case, but rather considered the pending charges within the context of the respondent's extensive criminal record as a whole. *See* I.J. at 18. *Cf. Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995) (noting the Board's hesitance "to give *substantial* weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein") (emphasis added). Nor did the Immigration Judge rely too heavily on the respondent's myriad claims of innocence, but instead factored in her narrow denials of culpability as one of many factors belying her claim of rehabilitation. *See* I.J. at 9-11, 18-19; *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

We also disagree with the respondent's argument that the Immigration Judge relied too heavily on her convictions related to child endangerment when balancing the various discretionary factors. While it is true that these convictions were more than 10 years old at the time of the respondent's last hearing, the Immigration Judge considered them merely as part of a pattern of criminal behavior covering more than 15 years. *See* I.J. at 17-20. Furthermore, her concern with the Immigration

Judge's failure to take into account the "mitigating factors" surrounding the convictions does not convince us that the Immigration Judge erred in this regard, as the record reflects that the Immigration Judge considered the respondent's testimony regarding the events surrounding those convictions, and no corroborative evidence was submitted in relation to the alleged "mitigating factors". *See* I.J. at 9-10, 18-19; Tr. at 201-11.

The respondent further avers that the Immigration Judge improperly considered that she could ultimately be incarcerated as a result of the charges pending against her, and thus be separated from her family for her own misdeeds, thereby reducing the weight accorded to the hardship that the respondent's family would face if she were removed to Guyana. We disagree with this characterization of the Immigration Judge's decision. The Immigration Judge stated that the respondent has an ongoing pattern of criminal arrests and convictions that have periodically resulted in her temporary separation from her children in the past, and that it was thus uncertain whether she would be able to remain with her children even if she were not removed to Guyana. *See* I.J. at 17. He did not state, as the respondent alleges, that she might be separated from her children specifically as a result of the possible outcome of the pending charges. *Id.* We thus find that the Immigration Judge did not erroneously speculate on the outcome of the pending charges, but instead determined that the weight to be attributed to the hardship that the respondent's family would face upon her removal

was reduced by the fact that the respondent had been separated from her children in the past due to her criminal conduct and by her failure to demonstrate meaningful rehabilitation that would prevent such separations in the future.

Furthermore, the Immigration Judge's consideration of the unresolved arrests and pending charges did not violate the respondent's procedural due process rights, as she was not denied a "meaningful opportunity to be heard." The respondent's removal proceedings, on remand alone, spanned almost 3 years as evidenced by the nearly 500-page transcript contained in the record. During that period, the respondent was given ample opportunity to testify and provide other evidence demonstrating that it would be in the best interest of the United States for her to remain in this country, and throughout that period she continued her pattern of arrests and criminal convictions. *See* Exhs. 3, 8, 27-29. *See also* Tr. at 58-59, 127-71, 435-37. Additionally, the Immigration Judge granted the respondent a continuance of approximately 4 months on April 11, 2005, in order for her to obtain a disposition in relation to her most recent arrest, as she had indicated that she had a hearing scheduled for May 2, 2005, regarding her March 21, 2005, arrest.[2] *See* Tr. at 435-41. As the foregoing demonstrates, the Immigration Judge provided the respondent with a meaningful opportunity to pres-

[2] As of December 9, 2005, the criminal matter related to the respondent's March 21, 2005, arrest remained unresolved. *See* I.J. at 12, 18. *See also* Tr. at 460.

ent her case and did not violate her procedural due process rights. *See* I.J. at 17-19.

In addition, the respondent argues that the Immigration Judge made an adverse credibility finding that is not supported by the record, and she cites a precedent asylum case in support of her argument. The asylum case is inapposite, however, as an asylum application may be denied solely on the basis of a valid adverse credibility finding. *See Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). Conversely, lack of credibility may affect the weight given to various factors to be considered in a discretionary grant or denial of cancellation of removal, and lack of candor may itself serve as an adverse factor in a discretionary decision, but incredible testimony may not form the sole basis for a discretionary denial of such relief. *See Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994). *See also Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). In accordance with this standard, the Immigration Judge gave less weight to the equities that were weakened by the respondent's incredible testimony, but did not make an overall "adverse credibility finding" and deny her application on that basis. *See* I.J. at 18-19. We find that the Immigration Judge's determination that the respondent's testimony lacked full veracity is supported by inconsistencies evident in the record, including the respondent's inconsistent statements regarding the number of times she had shoplifted without being detected by the authorities (15 versus 1,000 undetected larcenies: *compare* Tr. at 254-57 *with* Tr. at

264-76), her contradictory testimony regarding whether she had been banned from Macy's department store prior to her burglary conviction (*compare* Tr. at 136-37 *with* Tr. at 276-78), and her denial that she had admitted to committing the key elements of felony burglary in the course of her guilty plea for such crime, which conflicted with the transcript of her plea (*compare* Tr. at 131-36 *with* Exh. 17).[3] We therefore agree with the Immigration Judge that the respondent's lack of candor undermined her claims of rehabilitation and generally weighed against a discretionary grant of relief.

The respondent also asserts that her 2003 conviction for felony burglary was not more serious than her prior convictions for petit larceny, and that the Immigration Judge thus erred in stating that her convictions had increased in severity. She does not further expound on this argument. Contrary to her assertion, a felony burglary conviction can properly be found to be more serious than a misdemeanor petit larceny conviction, and we thus find her argument lacks merit. Overall, we agree with the Immigration Judge that the respondent's extensive, ongoing pattern of criminal behavior outweighs the equities she has presented, and that she does not warrant a favorable exercise of discretion with respect to her cancellation application. *See* I.J. at 16-20.

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[3] As these discrepancies are sufficient to support the Immigration Judge's finding regarding the respondent's lack of candor, we will not address the other inconsistencies noted by the Immigration Judge.

We also agree with the Immigration Judge's discretionary denial of the respondent's application for a waiver of inadmissibility under section 212(h) of the Act, for the same reasons we agree with the denial of her cancellation application. *See* I.J. at 20. *See also Matter of C-V-T-, supra*; *Matter of Mendez, supra*. Any hardship that her family will face upon her removal to Guyana does not outweigh her substantial criminal history. *See* I.J. at 16-20. Because we agree with the Immigration Judge that the respondent does not merit a waiver of inadmissibility in the exercise of discretion, we need not reach the issue of her statutory eligibility for such a waiver. Finally, we are not persuaded by the respondent's appellate argument that our decision in *Matter of Mendez, supra*, is incorrect and should be overturned. Rather, we find that that precedent decision is clearly applicable to the respondent's case and counsels against granting her a waiver of inadmissibility under section 212(h) of the Act.

Accordingly, the following order shall be entered:

ORDER: The appeal is dismissed.

/s/ ROGER D. PAUL
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

MINA KIM PARK, ESQ.
CLEARY, GOTTLIEB, STEEN & HAMILTON
ONE LIBERTY PLAZA
NEW YORK NY 10006

IN THE MATTER OF	FILE	DATE:
HENRY, JENNY LEE*	A 38-619-316	Dec 9, 2005

___ UNABLE TO FORWARD — NO ADDRESS PROVIDED

___ ATTACHED IS A COPY OF THE WRITTEN DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION

OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE BOARD OF IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT.

IMMIGRATION COURT
201 VARICK ST., RM 1140
NEW YORK, NY 10014

___ OTHER: _____

_____

/s/ [ILLEGIBLE]
COURT CLERK
IMMIGRATION COURT

CC: ASSISTANT DISTRICT COUNSEL,
201 VARICK STREET, ROOM 1130
NEW YORK, NY, 10014

ALH

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 VARICK STREET
NEW YORK, NEW YORK

File No. A38-619-316 December 9, 2005

IN REMOVAL PROCEEDINGS

In the Matter of:

HENRY, JENNY LEE,
a.k.a. ALLEN, Karen; Henry, Karen; Williams, Annette; Scantlebury, Andrea; Sherily; Williams; Henry, Jennylee; Williams, Lorna; Smith, Sharon; Henry, Jennymary; Williams, Shelly,

Respondent.

CHARGE: INA § 237(a)(2)(A)(ii)
Multiple Crimes Involving Moral Turpitude

APPLICATIONS: INA § 212(h)(1)(B)
Waiver of Inadmissibility

INA § 240A(a)
Cancellation of Removal

ON BEHALF OF THE RESPONDENT
Mina Park, Esq.
Cleary, Gottlieb, Steen and Hamilton LLP
1 Liberty Plaza
New York, New York 10006

ON BEHALF OF THE DEPARTMENT
Stan Weber, Esq.
Assistant District Counsel
201 Varick Street
New York, New York 10014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Facts and Procedural History

Jenny Lee Henry ("Respondent") is a native and citizen of Guyana. On November 11, 1984, she entered the United States at John F. Kennedy Airport, Queens, New York, and was admitted as a Lawful Permanent Resident ("LPR"). [Ex. 1.]

Since 1990, the Respondent has given birth to five children, all of whom are U.S. citizens. The current ages of the children, all girls, are: Shaneiqua Henry, fifteen years old; Oneika Henry, fourteen years old; Tameika Henry, ten years old; Alizah Henry, eight years old; and Asha Henry, seven years old. [Ex. 7.] The Respondent's mother, Lucille Charles, is a U.S. citizen residing in Brooklyn, New York. [Ex. 5.] The Respondent has three brothers, one sister, and one half-sister, all of whom are citizens or LPRs and reside in the U.S.

The Respondent's father, Clarence Boston, was admitted to the U.S. as an LPR on August 28, 2005, after having lived in Guyana since the rest of his family migrated to the U.S. [Ex. 21.]

On October 5, 1987, the Respondent was convicted of petit larceny in violation of § 155.25 of the New York Penal Law ("NYPL"). [Ex. 1.] Since then, the Respondent has been convicted of more than thirty misdemeanor offenses, including endangering the welfare of a child, petit larceny, and disorderly conduct. [Exs. 1, 3, 8, and 20.] She has also been convicted of burglary in the third degree, which is a felony. [Ex. 17.] When the Court closed the record for these immigration proceedings, the Respondent was awaiting trial on two additional misdemeanor charges. [Ex. 27.]

The Immigration and Nationality Service ("INS") issued a Warrant for Arrest of Alien (Form I-200) on May 24, 2000. [Ex. 1.] On June 12, 2000, the Respondent was served with the Notice to Appear {"NTA") while in custody, charging her with deportability pursuant to § 237(a)(2)(A)(ii) of the Immigration and Nationality Act ("INA"), as an admitted alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. [Ex. 1.] The NTA cited two separate convictions for petit larceny, the judgments for which were entered on January 10, 2000 and March 14, 2000, as the basis for this charge. *Id.* On August 17, 2000, the Respondent was served with Form I-261, lodging an additional factual allegation against the Respondent that she had been convicted of petit larceny on October 5, 1987. [Ex. 1.]

The Respondent acknowledged receipt of a Notice of Custody Determination (INS Form I-286) on June 12, 2000, the same day that she was served with the NTA, and she requested a review of the custody determination by an immigration judge. [Ex. 1.] As of June 13, 2000, she was detained at the Avoyelles Women's Correctional Facility in Cottonport, Louisiana. [Ex. 1.] She was released and returned to New York in June 2001. The Respondent is currently under an order of supervision by the Department of Homeland Security.

On June 13, 2000, the Respondent appeared before the Immigration Court in Oakdale, Louisiana, and conceded removability. The Respondent affirmed to the Oakdale Court that she had submitted an application for cancellation of removal.

On December 12, 2000, the Oakdale Court denied her application for cancellation of removal on the basis that her application was time-barred under INA § 240A. The Oakdale Court ordered Respondent removed to Guyana.

The Respondent appealed this decision to the Board of Immigration Appeals ("BIA"). On March 23, 2001, the BIA affirmed, without opinion, the decision of the Immigration Judge. The Respondent, through counsel, submitted a motion to reconsider, arguing that the "stop-time" rule in INA § 240A(a), enacted in 1996, could not be applied to Respondent's 1987 conviction without violating the ex post facto clause of Art. I, § 9, Cl. 3 of the U.S. Constitution.

On May 15, 2001, the BIA denied the Respondent's motion to reconsider. The BIA, relying on

Matter of Perez, 22 I. & N. Dec. 689 (BIA 1999), stated that an offense described in INA § 240A(d)(1) is deemed to end continuous residence as of the date of its commission. Therefore, the BIA determined that the Respondent was ineligible for relief because she had not resided in the U.S. for seven years before her 1987 conviction for petit larceny. The BIA acknowledged the Respondent's constitutional argument but noted that neither the Immigration Judge nor the BIA has the authority to rule on the constitutionality of laws enacted by Congress.

The Respondent appealed to the United States District Court of the Southern District of New York ("S.D.N.Y."), seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241, vacating her order of removal and declaring her eligible to apply for cancellation of removal pursuant to INA § 240A and a waiver of removal under INA § 212(h).

On November 30, 2001, the S.D.N.Y. granted the Respondent's petition. The S.D.N.Y. held that the provisions of INA § 240A that were enacted in 1996 and limit an alien's ability to seek relief from an order of removal could not be applied retroactively. Applying these provisions to a crime committed before the law was passed, where removal proceedings were not commenced until after the law took effect, would violate the ex post facto clause of Art. I, § 9, Cl. 3 of the U.S. Constitution. Having reached a decision on the ex post facto issue, the S.D.N.Y. declined to rule on the equal protection claim regarding INA § 212(h). The S.D.N.Y. remanded the case and directed the INS to permit the Respondent to file applications for cancellation of removal pursuant to

INA § 240A and a waiver of removal pursuant to INAS § 212(h). *Henry v. Ashcroft*, 175 F. Supp. 2d 688.

In a per curiam order dated June 10, 2002, the BIA vacated its decisions from March 23, 2001 and May 15, 2001. The BIA remanded the case to this Court for further proceedings consistent with the S.D.N.Y.'s decision and order. [Ex. 1.]

On December 26, 2001, the Respondent's mother, Lucille Charles, filed an I-130 petition on her behalf. [Ex. 5.] On August 13, 2002, the Respondent submitted a Motion to Change Venue on July 31, 2002. [Ex. 2.] On August 13, 2002, the Oakdale Court granted the Respondent's motion, and ordered venue changed to New York, New York. [Ex. 2.] Hearings at this Court commenced on January 29, 2003.

On April 2, 2003, the Respondent filed Form EOIR-42A: Application for Cancellation for Removal for Certain Permanent Residents. [Ex. 4.] On April 3, 2003, the Respondent filed Form I-601: Application for Waiver of Ground of Excludability. [Ex. 6.]

The Respondent testified in support of her applications on May 28, 2004; November 1, 2004; April 11, 2005; and August 8, 2005. On November 1, 2004, Denise Adler, a friend of the Respondent, testified on her behalf. After the last hearing, on August 8, 2005, the Court left the record open until October 7, 2005, in order to give the parties time to submit additional evidence. When the record of these proceedings was closed on October 7, 2005, the Respondent had three criminal charge pending, and in addition, was scheduled to appear for probation violation [Ex. 14.]

II. Exhibits

Group Exhibit 1: Record from below, including:

- Notice to Appear (served June 12, 2000)
- Form I-261: Additional Grounds of Inadmissibility/ Deportability (served August 17, 2000)
- Criminal conviction records for the convictions alleged in the Notice to Appear
- Warrant for Arrest of Alien (issued May 24, 2000)
- Notice of Custody Determination (determined June 9, 2000)
- Transcript of oral decision issued by Immigration Court in Oakdale, LA, on December 12, 2000
- BIA Decision of March 23, 2001
- BIA Decision of May 15, 2001
- S.D.N.Y. Decision of November 30, 2001
- BIA Decision of July 10, 2002

Group Exhibit 2:	— Motion to Change Venue (submitted July 31, 2002) — Order of the Immigration Judge granting change of venue (August 13, 2002)
Group Exhibit 3:	Materials related to Respondent's criminal arrests and convictions
Exhibit 4:	Form EOIR-42A: Application for Cancellation of Removal for Certain Permanent Residents (filed April 2, 2003).
Exhibit 5:	Form I-797C: Immigration Petition for Relative, Fiancé(e) or Orphan (filed by Lucille Charles on December 26, 2001).
Exhibit 6:	Form I-601: Application for Waiver of Ground of Excludability (filed April 3, 2003).
Group Exhibit 7:	Summary sheet of respondent's exhibits
7B	— Additional responses to Form EOIR-42A
7C	— Form G-325A: Biographic Information Form
7D	— Respondent's I-551 Permanent Residence Card
7E	— Passport pages of the Respondent
7F	— Respondent's Social Security Card
7G	— Respondent's birth certificate

7H	— Respondent's employee identification card from Cabrini Care at Home
7I	— Respondent's tax returns from 1998, 1999, 2001, 2002, 2003, and 2004
7J	— Pictures of the Respondent's children (Spring 2001 and Spring 2003)
7K	— Birth certificates for all five of Respondent's children
7L	— Social Security Cards for all five of Respondent's children
7M	— Report cards for the 2002-2003 school year for four of Respondent's five children: Shanequia, Tameika, Alizah, and Asha
7N	— Medical and immunization records for Respondent's youngest three children: Tameika, Alizah, and Asha
7O	— New York State benefit identification cards for four of Respondent's five children: Shanequia, Tameika, Alizah, and Asha
7P	— Local health benefit identification cards for all five of Respondent's children
7Q	— Respondent's lease

7R	— Proof of bank account for Oneika Henry, Respondent's second child, evidencing her receipt of Supplemental Security Income (SSI)
7S	— Earnings statement of Respondent
7T	— Mail to Respondent's home address from the New York City Board of Education
7U	— Proof of Respondent's completion of various training programs for parenting skills and home health care
Group Exhibit 8:	— Certificate of Disposition showing that Respondent pled guilty to Petit Larceny on October 16, 2002, related to March 26, 2002 arrest
	— Certificate of Disposition showing that the charge of Petit Larceny related to November 3, 2002 arrest was dismissed and case sealed on August 7, 2003
	— Certificate of Disposition showing that the charge of Petit Larceny related to November 22, 2002 arrest was dismissed and case sealed on July 10, 2003

— Certificate of Disposition showing that the charges for robbery related to July 30, 2002 arrest were dismissed and case sealed on March 5, 2003
— Certificate of Disposition showing that the charges for harassment and aggravated harassment related to December 8, 2001 arrest were dismissed on September 9, 2002

Group Exhibit 9:
— Letters from Goodwill Industries certifying Respondent's participation in a Skills Assessment and Job Placement program
— Letter of support from Shanequia Henry, Respondent's eldest child
— Letter of support from Oneika Henry, Respondent's second child
— Letter of support from Tameika Henry, Respondent's third child
— Letter of support from Lucille Charles, Respondent's mother (undated)

Exhibit 10: U.S. Department of State, *County Reports on Human Rights Practices: Guyana* (2002)

Exhibit 11:	Respondent's application for GED testing (dated December 9, 2003)
Exhibit 12:	Letter from Shoplifters Alternative certifying Respondent's participation in the SA Course (dated January 30, 2004)
Exhibit 13:	Rider to Form EOIR-42A, Question 41 and 45 and supporting documents
Group Exhibit 14:	— Materials from Respondent's file with the City of New York Department of Probation — Respondent's order of protection against Carol Rodriguez (dated July 29, 2004) — Letter from Kings' County probation officer, dated October 7, 2005
Exhibit 15:	Updated photographs of Respondent's children
Exhibit 16:	Respondent's Immigrant Visa and Alien Registration (dated November 11, 1984)
Group Exhibit 17:	— Certificate of Disposition showing that Respondent pled guilty to burglary in the third degree on September 19, 2003 in relation to a November 23, 2002 arrest, and was sentenced to five

	years probation and $200 surcharge on November 18, 2003 — Indictment in the above case accusing Respondent of committing burglary in the third degree on November 29, 2002 — Transcript of plea process in the above case
Exhibit 18:	Respondent's report from the City of New York Department of Probation
Exhibit 19:	Respondent's Social Security earnings statement (dated October 4, 2004)
Group Exhibit 20:	— Complaint from the Criminal Court of the State of New York charging Respondent with endangering the welfare of a child (dated July 11, 1993) — Complaint from the Criminal Court of the City of New York charging Respondent with endangering the welfare of a child (dated December 8, 1995)
Exhibit 21:	Copy of passport pages of Clarence Arthur Boston, evidencing LPR status of Respondent's father

Group Exhibit 22:	— Respondent's letter of termination from Cabrini Care at Home (dated July 21, 2004) — Certified copy of Respondent's application for employment at Cabrini Care at Home
Group Exhibit 23:	Letters from various employers, including home health care organizations, indicating Respondent's employment history
Exhibit 24:	Immigration records for Andre Scantlebury, father of Respondent's three youngest children
Group Exhibit 25:	Materials relating to Andre Scantlebury's criminal record
Exhibit 26:	Record of proceedings from Respondent's eviction case in Housing Court
Exhibit 27:	Criminal Court of the City of New York document charging Respondent with committing Petit Larceny on March 21, 2005
Exhibit 28:	Complaint charges relating to June 2005 assault arrest
Exhibit 29:	Letter from Greg Gomez, Legal Aid Attorney, dated October 3, 2005, regarding outstanding arrest warrant in Hempstead, NY

* * *

Exhibit A: (non-evidentiary):	Letter from Respondent's counsel stating she is eligible for direct relief under § 212(h) (dated May 13, 2003)

III. Testimony

A. Testimony of the Respondent

On May 28, 2004, the Respondent testified as follows:

The Respondent is a thirty-eight-year-old LPR who entered the U.S. when she was nineteen years old, in November 1984. She has never been married, and currently lives in Brooklyn, New York. She has five female children, all of whom are under eighteen years old and all of whom currently live with the Respondent. All five children are U.S. citizens, and all are currently attending school. Four of the Respondent's children receive public assistance in the form of welfare benefits. Oneika Henry, the Respondent's second child, has received Supplemental Security Income ("SSI") since birth because she has eczema, an on-going medical condition.

The Respondent has a number of other family members in the U.S. Her sixty-year-old mother, Lucille Charles, is a naturalized U.S. citizen, and currently lives in Brooklyn, New York. The Respondent has three brothers, one sister, and one half-sister in the U.S., all of whom are citizens or LPRs, and all of whom live in New York. The Respondent talks regularly on the phone with her mother and all her siblings, and sees each of them at least once

a month. The Respondent's maternal grandfather, who is eighty-nine years old, lives in Queens, New York, and she sees him approximately once every two months.

The Respondent has almost no family remaining in Guyana. She has one aunt, who is approximately 50 years old, living in Georgetown, but the Respondent has not seen her since 1984, and speaks to her on the phone only twice a year. When this testimony was given, the Respondent's father was still in Guyana; however, he has since emigrated to the U.S. as an LPR. The Respondent has not visited Guyana since she arrived in the U.S. in 1984, and her five children have never visited Guyana.

While living in Guyana, the Respondent completed the equivalent of high school. However, she has not yet obtained a general educational development (GED) credential in the U.S. The Respondent testified that she hopes to take the GED examination in August 2004, and aims to submit the application in the near future. The Respondent claims that she came to the U.S. to work, provide for her family, and to get an education. She wanted a better environment and a better standard of living than she thought was available in Guyana.

The Respondent testified that she has been employed in fifteen or more different positions since she came to the U.S. At the time of this testimony, she was employed full-time as a home health aide by Cabrini Care at Home, a home health care organization. The Respondent worked between 20-60 hour per week; her hours were variable because her

employer frequently gave her extra shifts. On days when she worked extra shifts, she started work at 9 a.m. and did not finish until 11:30 p.m. The Respondent's duties included administering medicine and changing dressings. Previously, she had been employed by other home health care organizations, had been a self-employed hairdresser, and had held various administrative positions. The Respondent testified that all her positions were "on-the-books" employment. She has filed tax returns every year since 1985, except for the period during which she was detained by the INS.

The Respondent is the only adult in her household, and she lives with her five children. During a period of about one year, from June 2000 until June 2001, when the Respondent was incarcerated in Louisiana by INS, the Respondent's five children lived with Andre Scantlebury, the father of the youngest three children. The Respondent testified that the children did not receive welfare benefits during this period.

The Respondent testified that since her release from INS custody, she has been very involved in her children's education. She helps her children with their homework, by assisting them with reading and understanding problems. Her children receive As and Bs in school. She goes to appointments at their schools, and gives them snacks for school trips. Her eldest daughter, Shanequia, had problems in junior high school, so the Respondent fought to get her transferred to another school. Shanequia's grades have improved and she started high school in September 2004.

When the Respondent first arrived in the U.S., she had trouble making ends meet from her wages. She started accompanying friends to retail establishments, where she and her friends would shoplift. The Respondent had been arrested and convicted of petit larceny three times before her first child was born. She then continued to shoplift after each child was born. The Respondent pled guilty to more than twenty charges of petit larceny from 1987-2000. She stated that she was not actually guilty in three or four of these occasions. She testified that she pled guilty to crimes she did not commit so that she would not serve jail time, and she claimed that on at least one occasion she was not required to admit to the elements of the crime during her plea. The Respondent testified that she has never been barred from a retail store.

The Respondent was detained in Louisiana by INS from June 2000 until June 2001. She testified that it was very hard to be separated from her children during this period. The Respondent claimed that the time she spent in INS custody was a "wake-up call" that urged her to give up shoplifting and take better care of her children. She states that her life has changed. She has stopped socializing with her friends who shoplift, and she now just spends time with her children. She found a full-time job as a home health care aide, and worked long hours. She then moved to a different home health care organization so that she could have more time to stay with her children and help them complete their homework. Nonetheless, the Respondent admitted that she had been arrested at

least three times since her release from custody. She claims that these arrests were cases of mistaken identity, or that she was in the wrong place at the wrong time.

She testified that she was arrested in December 2001 and charged with harassment. A neighborhood woman was making abusive phone calls, so Respondent complained to the police. According to the Respondent, the woman then lied to the police and claimed that Respondent had tried to burn down her house. The case against the Respondent was ultimately dismissed.

The Respondent claimed not to remember being arrested on March 26, 2002. However, at a later point in her testimony she recalled the March 26th arrest, and explained that it occurred because she was trying to return a damaged bottle of hairspray to a retail store, and she "got into a scuffle" when the private security officers asked for a receipt.

The Respondent was arrested in July 2002. She stated that it was a case of "self-defense" and that the charges were ultimately dismissed. She said that two separate charges from 2002 and 2003 were also dropped.

The Respondent was arrested on November 23, 2002, and charged with burglary in the third degree. She pled guilty on September 19, 2003, though she claims she was innocent. She stated that she never actually admitted committing the crime while in the courtroom. She was under the impression that she would not be able to prevail at trial, because she was "already in the system." Con-

sequently, she pled guilty in order to avoid a more severe punishment.

The Respondent has been through two separate rehabilitation programs for theft-related offenses in the last twelve years. She testified that, in 1994, a criminal court ordered her to attend a rehabilitation program, and that she completed that course as directed. However, she found the course to be ineffective because it was not tailored for shoplifting; many participants had drug convictions unrelated to shoplifting. In 2004, at the suggestion of her counsel, the Respondent completed a course offered by the non-profit Shoplifters Alternative designed to rehabilitate chronic shoplifters. She stated that she gained a lot from this program, in part because she participated in the program voluntarily and approached it with a positive attitude. The program taught her to think about the consequences and realities of shoplifting, and offered her a helpline for on-going support. According to the Respondent, this caused her to rethink her habitual shoplifting, and she states that she will not shoplift again. The Respondent claims to have made an appointment with the Caribbean Mental Health Center, located in Crown Heights, Brooklyn, in order to reinforce the lessons of Shoplifters Alternative.

In addition to her convictions for theft, the Respondent was arrested and convicted of endangering the welfare of a child on two separate occasions. In 1993, she left her two eldest children, aged two years old and three years old, in the care of an adult friend. She claims that her friend left

the girls in the care of a nine year old, and all three children were found alone when the fire department came to the building on an unrelated matter. The Respondent lost custody of her children for about a year after this incident, and attended court-mandated parenting classes. In 1995, the Respondent left her six-month old and her four-year-old alone while she went across the street to pick up the five-year-old from school. The Respondent testified that it was a very cold day, and she felt it was better to leave the little girls in the house than expose them to the cold weather. When the building maintenance people knocked on the door, the four-year-old opened the door. The maintenance people called the police. Regardless of these two incidents, the Respondent feels she is a good mother and stated that since 1995, she has never left the children alone.

On cross-examination, the Respondent testified as follows:

Andre Scantlebury is the father of the Respondent's youngest three children. He lived in Respondent's household on-and-off from 1992 until 2003. He was arrested during this period for domestic violence and for urinating by the garbage cans. He provided some child support, but stopped in March 2003, when he was arrested. At the time of this testimony, he was being held without bond on harassment and drug trafficking charges. The Respondent states that he is no longer a part of her life. Her children know that Mr. Scantlebury is in jail. Patrick Dillon is the father of the eldest two children. Since June 2001, he has brought approxi-

mately $150 to the house every two weeks, but he is not under a court order to provide child support.

The Respondent admitted that, in addition to her period in INS custody, she has spent time in jail away from her children. The longest period was from March 2, 2000 to June 7, 2000, when she was incarcerated on Rikers Island. During this period, her children were with Andre Scantlebury, and she had no contact with them. She testified that Andre Scantlebury was a good parent during this period; for example, he made sure the children went to school. The Respondent has told her children about her problems with shoplifting. She said that they understand, but they do not like her being locked up. Her second child, Oneika Henry, was deeply affected by her absence and underwent psychiatric counselling at her school.

The Respondent stated that she is rehabilitated and would not be arrested again. A neighbor who provoked fights has moved away. Even though the Respondent received at least four disciplinary write-ups while in jail, and has been arrested for domestic violence, she states that she has no problems with anger or violence now.

The Respondent asserted that neither her employer, Cabrini Care at Home, nor her home care patients, are aware of her criminal record. She testified that when she sought employment with Cabrini in January of 2003 she was not asked whether she had been arrested. When asked for a copy of her employment application, the Respondent produced the application, which indicated that she was asked whether she had ever been con-

victed of a felony or other serious offense (other than a minor traffic violation). [Ex. 22.] The Respondent had answered "no" to this question on her application [*Id.*], even though she had been convicted of a number of misdemeanor offenses by this date [Exs. 3, 8, and 20]. While it is true that the Respondent had not been convicted of a felony by January 2003, her misdemeanor convictions for petit larceny and endangering the welfare of a child could be considered serious offenses, and especially in the aggregate, should have prompted a more forthright response.

The Respondent initially stated that she had gotten away with shoplifting around fifteen times. She started stealing in 1987, and from 1987 until 1990, she made her living by shoplifting. She admitted that she stole on a daily basis during this period. When pressed by opposing counsel, she admitted that this amounted to over 1,000 incidents where she had shoplifted and had not been caught. She agreed that she was very successful at shoplifting. The Respondent admitted that she had been barred from entering Macy's store, even though on direct she stated that she had never been barred from a retail establishment.

The Respondent did not list all of [the] children on her 2003 income tax returns. She admitted that an acquaintance, Eustice Scantlebury, claimed her eldest two children on his tax returns. She states that he had never discussed with her that it would be a great advantage to him to claim the children on his tax returns. Furthermore, the Respondent listed her income as a self-employed hairdresser on

her 2003 returns, but admitted that she did not have a licence [sic] to operate as a hairdresser in New York.

The Respondent admitted that she took a trip to New Jersey in 1990 for the express purpose of shoplifting. She admitted that she was arrested and sentenced to thirty days in jail when her first child was only three months old, and that during this period her sister Vonetta took care of the child. She admitted that she later took a vacation to Miami, and got involved in a shoplifting incident while she was there. She also admitted that she was arrested and spent one night in jail in Philadelphia while her children were very young.

The Respondent stated that she is rehabilitated and she will not steal again. She claims that being arrested is embarrassing, and she no longer wishes to be embarrassed. She states that the Court should know she is serious about relinquishing shoplifting because she spent $400 on her outfit for court instead of shoplifting the clothes.

On redirect, the Respondent stated that she has not been arrested since November 2002, and that she is focusing on keeping her children together.

* * *

On November 1, 2004, the Respondent testified as follows:

The Respondent's employment at Cabrini Care at Home was terminated on June 21, 2004, because she had too many absences. Since then, she applied to a program at Goodwill, and is supporting her

family with public assistance. She has an assignment to a school for GED classes, but she did not yet have a scheduled date for the test.

The Respondent was arrested on July 24, 2004, when she got into a fight with a neighbor. The Respondent claimed that she missed her probation appointment on October 18, 2004, because she was caught up with a program at Goodwill, in which she started participating on September 21, 2004.

Even though Andre Scantlebury has a lengthy criminal record and was ordered removed from the U.S. in 1997, the Respondent stated that she had no other choice but to leave her children with him while she was in INS custody in 2000-2001.

* * *

On April 11, 2005, the Respondent testified as follows:

The Respondent started working part-time as a receptionist in March 2005. She works for 35 hours per week, and is paid $250-300 per week, "on the books." She and her children are still receiving a rent subsidy and food stamps. The Respondent still did not have a date to take the GED examination, but she was still preparing for the test.

The Respondent was arrested on March 21, 2005, and charged with petit larceny. No disposition had been entered at the time of this testimony.

* * *

On August 8, 2005, the Respondent testified as follows:

The Respondent was laid off from her last job as a receptionist in May 2005. She is presently working part-time for K&W Glass Co., where she fixes windows and doors. She has worked there for two months. She works twenty-five hours per week and is paid $9.50 per hour. She and her family are still receiving food stamps, but their rent subsidy was cut off in March 2005 because of on-going eviction proceedings.

As of the date of this testimony, the Respondent had not obtained a letter from Goodwill confirming her participation in a program on October 18, 2004, the day she missed her probation appointment. However, she later submitted a letter from Goodwill indicating that her dates of service were August 2nd until August 12th, 2004; September 30th until October 21, 2004; and March 9 until March 17, 2005. Though she was scheduled to appear in court regarding the probation violation on September 27, 2005, the matter was adjourned until November 29, 2005 [Ex. 14].

When this testimony was given, the Respondent had three pending matters in criminal court. She was scheduled to appear on an assault charge on September 13, 2005 and on a petit larceny charge related to the March 21, 2005 arrest on September 22, 2005. She had an additional petit larceny charge pending; this charge apparently relates to a June 30, 1997 arrest for which a bench warrant was issued sometime in late 1997. The warrant

was vacated and she was scheduled to appear in court on October 19, 2005.

B. Testimony of Denise Adler

On November 1, 2004, Denise Adler testified as follows:

Ms. Adler is a close friend of the Respondent. She is thirty-five years old, and like the Respondent, she is a native of Guyana. She emigrated to the U.S. in 1991 as an LPR. She is employed as a cook at a senior center in Brooklyn. Ms. Adler has been arrested twice, once for shoplifting and once for fighting, but both charges were dropped. Ms. Adler has known the Respondent for eleven years, and she sees her three times per week. Ms. Adler's children attend school with the Respondent's children. Ms. Adler and the Respondent frequently attend St. Gabriel's church in Brooklyn. The Respondent started to go to church when she was released from INS custody in 2001, and she has attended services once weekly for about two years.

Ms. Adler is aware of the Respondent's history of shoplifting, but she acknowledges that they do not discuss it much. She stated that she knew some of the Respondent's friends personally, and they led the Respondent "into destruction." Ms. Adler has tried talking to the Respondent about her association with these friends. Ms. Adler did not think that the Respondent was still "in trouble with the law" at the time of this testimony. She stated that the Respondent stopped shoplifting in 2001, when she was released from INS custody. However, she

acknowledged that sometime in 2002 or 2003, the Respondent called Ms. Adler and asked her to watch the Respondent's children, as the Respondent was being held by a retail store's security officers. Ms. Adler knows of only one time that the Respondent was arrested after leaving INS custody.

Ms. Adler stated that the Respondent had changed when she was released from INS custody. She now spends more time with her children, cooking for them, and taking them to movies. Ms. Adler noticed that the Respondent's children suffered while the Respondent was in INS custody. Ms. Adler stated that with a man instead of a woman looking after the children, they did not have the proper care. If the children were to remain in the U.S. after the Respondent's removal, Ms. Adler has no idea who would take care of them.

On cross-examination, Ms. Adler admitted that she came to know the Respondent through Andre Scantlebury, the father of three of the Respondent's children. Ms. Adler was aware that Mr. Scantlebury is in prison, but did not know why. Ms. Adler stated that she had never seen the Respondent get into fights.

IV. Legal Standard

A. Cancellation of Removal

Section 240A(a) of the Act provides that an alien is eligible for cancellation of removal if she: (1) has lawfully been admitted for permanent residence for not less than five years; (2) has resided in the

United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of an aggravated felony. Pursuant to INA § 240A(d)(1) (the "stop-time" rule), any period of continuous residence in the United States shall be deemed to end when the applicant is served with an NTA, or when the applicant commits an offense that renders her inadmissible to the United States under INA § 212(a)(2) or removable under INA § 237(a)(2) or § 237(a)(4). *See also Matter of Mendoza-Sandino*, 22 I. & N. Dec. 1236 (BIA 2000); *Matter of Campos-Torrea*, 22 I. & N. Dec. 1289 (BIA 2000).

The BIA has held that the "stop-time" rule enumerated in INA § 240A(d)(1) applies retroactively. *In re Perez*, 22 I. & N. Dec. 689 (BIA 1999); *In re Nolasco*, 22 I. & N. Dec. 632, 637 (BIA 1999). The U.S. Court of Appeals for the Second Circuit held that retroactive application of the stop-time rule does not violate due process when applied to suspension or deportation cases pending on April 1, 1997. *Rojas-Reyes v. INS*, 235 F.3d 115, 123-24 (2d Cir. 2000). However, the U.S. District Court for the Southern District of New York ("S.D.N.Y."), upon review of this case, found that the stop-clock rule *is* impermissibly retroactive when applied to respondents who committed crimes before § 240A went into effect, but whose removal proceedings were commenced after § 240A's effective date. *Henry v. Ashcroft*, 175 F.Supp.2d 688, 693 (S.D.N.Y. 2001). The S.D.N.Y. found that the clock-stopping provision attaches new legal consequences to events completed before the provision's enactment, and because these consequences impair important rights, the provision vio-

lates the ex post facto clause of Art. I., § 9, Cl. 3 of the U.S. Constitution. *Id.* at 694-95. Consequently, the stop-clock rule cannot be applied to crimes committed *before* April 1, 1997 by a respondent who is placed into removal proceedings *after* April 1, 1997. *Id.*

In addition to demonstrating statutory eligibility, an applicant for cancellation of removal bears the burden of showing that relief is warranted in the exercise of discretion. INA § 240A(a); *see also Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998). The BIA has held that the general standards developed for the exercise of discretion under former § 212(c) of the Act are also applicable to the exercise of discretion under INA § 240A(a). *Matter of C-V-T-*, 22 I. & N. Dec. at 10; *In re Javier Sotelo-Sotelo*, 23 I. & N. Dec. 201 (BIA 2001). In keeping with the general standards under former § 212(c), the Court should consider the record as a whole and balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented on her behalf. *Matter of C-V-T-*, 22 I. & N. Dec. at 11; *Matter of Buscemi*, 19 I. & N. Dec. 628, 633 (BIA 1988); *Matter of Marin*, 16 I. & N. Dec. 581, 585 (BIA 1978). In cancellation of removal cases, there is no threshold standard of unusual or outstanding equities; rather the Court must weigh favorable and adverse factors to balance the "totality of the evidence before us." *Sotelo-Sotelo*, 23 I. & N. Dec. at 204. More serious misconduct necessarily weighs more heavily against an exercise of discretion than does less serious misconduct; therefore the applicant must present additional favorable evidence to counterbalance an adverse factor such as

serious criminal activity. *Id.* at 203; *see also Matter of Marin*, 16 I. & N. Dec. at 585.

When exercising discretion in a cancellation of removal case, positive factors to be considered include, but are not limited to, family ties in the United States, residence of long duration in this country, evidence of hardship to the applicant and her family if removal occurs, a history of employment, existence of property or business ties, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the applicant's good moral character. *Matter of C-V-T-*, 22 I. & N. Dec. at 11; *Matter of Edwards*, 20 I. & N. Dec. 191, 194 (BIA 1990); *Matter of Marin*, 16 I. & N. Dec. at 584-585. Adverse factors include the nature and underlying circumstances of the removal ground at issue and any other evidence that could be indicative of an applicant's bad character or undesirability as a permanent resident of this country. *Matter of C-V-T-*, 22 I. & N. Dec. at 11; *Matter of Marin*, 16 I. & N. Dec. at 584; *see also Matter of M-*, 3 I. & N. Dec. 804 (BIA 1949).

B. Waiver of Inadmissibility pursuant to INA § 212(h)

Pursuant to INA § 212(h), the Attorney General may, in his discretion, waive various grounds of inadmissibility which would otherwise preclude adjustment of status, including: (1) crimes involving moral turpitude; and (2) multiple criminal convictions. INA §§ 212(a)(2)(A)(i)(I), and (B); *see also Matter of Sanchez*, 17 I. & N. Dec. at 218 (BIA 1980).

These grounds of inadmissibility may be waived in the case of an alien who demonstrates that her removal would result in extreme hardship to a U.S. citizen or lawfully resident parent, spouse, son, or daughter. INA § 212(h)(1)(B). In evaluating extreme hardship to a qualifying relative, factors to be considered include, but are not limited to: whether the qualifying relative has family ties to this country; the extent of the qualifying relative's family ties outside the United States; conditions in the country of removal; financial impact of departure from this country; and significant health conditions, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *In Re Cervantes*, 22 I. & N. Dec. 560, 566 (BIA 1999); *see also INS v. Jong Ha Wang*, 450 U.S. 139 (1981); *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th Cir. 1994). Further, even if the applicant demonstrates that she merits a grant of discretion under the waiver, she must also establish that she meets the terms, conditions, and procedures of the regulations promulgated by the Attorney General. INA § 212(h)(2).

Aliens already in the United States, who have not left and reentered, must submit applications for relief under § 212(h) in conjunction with an application for adjustment of status. 8 C.F.R. § 1245.1(f); *see also In re Michel*, 21 I. & N. Dec. 1101, 1102-1103 (BIA 1998) (an application for adjustment of status accompanies relief under § 212(h)). The benefits of § 212(h) are not available in removal proceedings unless granted in conjunction with adjustment of status. *Matter of Balao*, 20 I. & N. Dec. 440, 446 (BIA 1992); *Matter of*

Parodi, 17 I. & N. Dec. 608, 612 (BIA 1980); *Matter of Bernabella*, 13 I. & N. Dec. 42, 43-44 (BIA 1968).

On its face, INA § 212(h) waives only grounds of inadmissibility, not grounds of removability. However, aliens who are already present in the United States and subject to removal proceedings can apply for an adjustment of status; the respondent is then treated as an alien seeking entry. *See Matter of Alarcon*, 20 I. & N. Dec. 557, 562 (BIA 1992). If the application is granted, which requires, *inter alia*, that the alien be admissible to the United States for permanent residence, the adjustment of status effectively waives the grounds of removability. *See Tibke v. INS*, 335 F.2d 42 (2d Cir. 1964); *Snajder v. INS*, 29 F.3d 1203, 1207 (7th Cir. 1994). Arriving aliens (including LPRs reentering the country) need not file an application for adjustment of status in conjunction with an application for relief under § 212(h), because they are already, by definition, aliens seeking entry.[1]

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[1] Prior to the enactment of IIRIRA in 1996, the Eleventh Circuit found that distinguishing between permanent resident aliens merely on the narrow factual distinction of whether or not the alien departed and reentered the country prior to applying for § 212(h) relief constitutes an arbitrary distinction, and that is without a fair and substantial relation to the object of the legislation. *Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1995); *see also Maria v. McElroy*, 68 F.Supp. 2d 206, 213 (E.D.N.Y. 1999), overr'd on other grounds, *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). However, the Second Circuit found no violation of equal protection in post-IIRIRA case on a related matter. *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002) (rejecting an equal protection challenge to the aggravated felon bar to § 212(h) eligibility, which permits non-residents with aggravated felony convictions to apply for

V. Analysis

A. Cancellation of Removal

To establish eligibility for cancellation of removal, the Respondent must demonstrate that she: (1) has been lawfully admitted for permanent residence for not less than five years; (2) has resided in the U.S. continuously for seven years after admission; and (3) has not been convicted of an aggravated felony. INA § 240A(a).

The Respondent was admitted as an LPR in 1984, more than five years ago. [Exs. 7D and 7E.] The Respondent has resided in the U.S. continuously since then. On October 5, 1987, the Respondent was convicted of petit larceny, in violation of NYPL § 155.25. In an earlier appeal of this case, the Southern District of New York held that the Respondent's convictions dated prior to the enactment of INA § 240A, in April 1, 1997, cannot be used to "stop the clock" and prevent the accrual of seven years of continuous residence. *Henry v. Ashcroft*, 175 F.Supp.2d 688, 693 (S.D.N.Y. 2001). In addition, the Respondent has never been convicted of an aggravated felony. [Exs. 3, 14, 17, 18, 20, and 27.] Consequently, this Court finds that the Respondent is eligible

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§ 212(h) relief, but does not allow LPRs with aggravated felony convictions to do the same). However, the Court does not have the authority to rule on the constitutional questions in this case. *See, e.g., U.S. v. Gonzalez-Roque*, 165 F.Supp. 2d 577, 583 (S.D.N.Y. 2001) rev'd on other grounds, 301 F.3d 39 (2nd Cir. 2002); *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 912 (BIA 1997).

for cancellation of removal pursuant to INA § 240A(a).

In addition to demonstrating statutory eligibility, the Respondent bears the burden of showing that relief is warranted in the exercise of discretion. INA § 240A(a); *see also Matter of C-V-T-*, 22 I. & N. Dec. 7. The Court has reviewed the record as a whole and balanced the adverse factors evidencing the Respondent's undesirability as a permanent resident with the social and humane considerations presented on her behalf. *See Matter of Marin*, 16 I. & N. Dec. at 584. The Court finds that the Respondent has not met her burden of demonstrating that granting relief would be in the best interests of this country. *See id.*

When exercising discretion in the Respondent's case, the Court considered various positive factors including: family ties in the United States, residence of long duration in this country, evidence of hardship to her family if removal occurs, a history of employment, and proof of genuine rehabilitation given the Respondent's criminal record. *See Matter of Marin*, 16 I. & N. Dec. at 584-585. Adverse factors considered by the Court included: the nature and underlying circumstances of the removal ground at issue and any other evidence that could be indicative of an applicant's bad character or undesirability as a permanent resident. *Id.*

The Respondent has strong family ties in the United States, and almost no family ties to Guyana. She has five minor U.S. citizen children. [Ex. 7K.] Her U.S. citizen mother and her five siblings have all lived in the United States for years. Her father was admitted as an LPR on August 28, 2005. [Ex. 21.] She

has only one family member remaining in Guyana, an aunt with whom she is not particularly close. In addition, the Respondent has lived in the U.S. for her entire adult life, having left Guyana at the age of 19. She has not returned to Guyana, or in fact traveled abroad at all, during this entire period.

There is strong evidence that the Respondent and her family, including her five minor U.S. citizen children and her mother, would suffer hardship if removal occurs. The Respondent is currently the sole caretaker for her children. They have never visited Guyana, and their opportunities there would be far more limited than their opportunities in the United States. The Respondent's second daughter, Oneika Henry, suffers from eczema and receives SSI. [Ex. 7R.] It is unlikely that Oneika would receive the same level of medical treatment if she moved to Guyana with her mother. The eldest three children submitted letters of support indicating that they missed their mother greatly during the period when she was in INS custody from June 2000 until June 2001. [Ex. 9.] Nonetheless, the Court notes that the Respondent has frequently been separated from her children during short periods of incarceration following arrests or convictions for petit larceny and other misdemeanors, and that when the record was closed in this case, she was awaiting trial for two separate misdemeanor charges. It is hard to conclude, with any certainty, that even if the Respondent were to remain in the United States, she would be able to remain with her children. In addition, the Respondent has two criminal convictions for endangering the welfare of a child, received when her oldest children were

approximately the same age as her youngest children are now. [Ex. 20.] There is no doubt that the Respondent's removal could cause severe emotional and economic hardship to the Respondent's family, even though the Respondent has not always been able to provide for her children, relying occasionally on welfare, and has demonstrated an on-going pattern of criminal behavior.

The Respondent has a sporadic history of employment. She testified that since her release from INS custody in June 2001, she has made a more concrete effort to find reliable employment. [Exs. 9, 19, and 23.] To that end, she completed several training programs in home health care assistance. [Ex. 7U.] She has applied to sit for the GED examination [Ex. 11], but when the record was closed in this case, she had not yet been assigned a date. She has held full- and part-time jobs with a small handful of organizations since June 2001.

The Respondent, who has an extensive criminal record, testified that she has made some attempts at rehabilitation since her release from INS custody in June 2001. At the suggestion of her counsel, she voluntarily completed a Shoplifters Alternative course. [Ex. 12.] However, in her testimony, she failed to give a persuasive explanation of why she felt the Shoplifters Alternative was a more effective rehabilitation program than the court-mandated program she completed in 1994. Following both programs, the Respondent continued to establish a pattern of arrests and convictions. She admitted under oath that she was arrested at least six times during the years of 2002 and 2003, though she initially remem-

bered only three instances. She pled guilty to burglary in the third degree on September 19, 2003. [Ex. 17]. When the record was closed in this case, the Respondent was awaiting trial on two separate charges. The Respondent, relying on *Sotelo-Sotelo*, argues that the Court cannot consider these pending charges as adverse factors. 23 I. & N. Dec. at 205. This case, however, can be distinguished from *Sotelo-Sotelo*, because the Respondent has been formally arrested and charged in the United States, whereas Sotelo-Sotelo had only an outstanding warrant in a foreign jurisdiction. Consequently, this Court has considered the Respondent's pending trials as adverse factors indicating lack of rehabilitation. However, even without these two pending charges, and given her on-going pattern of criminal behavior, the Court would find that the Respondent is not rehabilitated. Given her on-going pattern of criminal behavior, the Court finds it hard to give much credence to the Respondent's claims of rehabilitation.

The Respondent's claims of rehabilitation are further weakened by the lack of remorse for her shoplifting arrests and convictions shown during her testimony. Taking responsibility and showing remorse for one's criminal behavior constitutes some evidence of rehabilitation in a § 212(h) case. *In re Jose Mendez-Moralez*, 21 I. & N. Dec. 296, 304 (BIA 1996). This is not to say that a respondent who claims innocence and does not express remorse could never present persuasive evidence of rehabilitation by other means. *Id.* But the fact remains that in the case before us, the Respondent repeatedly asserted that many of her shoplifting convictions were cases of

"mistaken identity," or occurred when she was in "the wrong place at the wrong time." She maintains that she was innocent of burglary in the third degree, although she pled guilty on September 19, 2003. While testifying before this Court, the Respondent stated under oath that she never admitted to committing the crime of burglary in the third degree. However, the transcript of the plea indicates clearly that she did. [Ex. 17.] Given the Respondent's lack of remorse, this Court cannot conclude at this point in time that she has exhibited evidence of genuine rehabilitation, a factor that should be considered in cases involving convicted aliens. *Matter of Edwards*, 20 I. & N. Dec.at 198. The Court is well aware that genuine rehabilitation is not a pre-requisite for discretion in cases involving criminal aliens, but in cases such as this it is a factor that should be considered, in view of the Respondent's lengthy criminal history of arrests and convictions.

Another factor mitigating against a favorable exercise of discretion is the Respondent's lack of credibility under oath. Lack of candor in itself serves as an adverse factor weighing against a favorable exercise of discretion in an INA § 212(c) case. *Matter of Burbano*, 20 I. & N. Dec. 872, 876 (BIA 1994). Standards developed for the exercise of discretion under INA § 212(c) are also applicable to the exercise of discretion under INA § 240A(a). *Matter of C-V-T-*, 22 I. & N. Dec.at 11. This Court found the Respondent to be an incredible witness on the stand, where portions of her testimony were both internally inconsistent, and inconsistent with the evidence she submitted. For instance, on cross-examination, the Respondent

testified that her former employer, Cabrini Care at Home, did not ask her about her criminal record when she applied for a job in 2003; when the Respondent later submitted a copy of her application at the Court's request, the submission indicated that Cabrini asked whether she had ever been convicted of a felony or other serious offense (other than a minor traffic violation), and the Respondent had indicated that she had no such convictions. Perhaps the biggest disparity in her testimony is her initial assertion that between 1987 and 1990, she had shoplifted without being caught approximately fifteen times; under cross-examination she admitted that there were, in fact, more than 1,000 such occasions. She also tried to convince this Court that many of her convictions were a result of being in the wrong place at the wrong time, in spite of the fact that she pled guilty, another indication of her lack of candor. In addition, the Respondent's lack of credibility regarding her criminal convictions further undermines her claims of rehabilitation. *See Matter of Khalik*, 17 I. & N. Dec. 518, 520 (BIA 1980).

Turning now to additional negative discretionary factors articulated in *Marin*, this Court finds considerable evidence to weigh against the Respondent's request for relief. First, the nature and circumstances of the underlying grounds for removal reflect extremely negatively on the Respondent. The original grounds for removal cited in the NTA are two petit larceny convictions from 2000. [Ex. 1.] Petit larceny constitutes a crime involving moral turpitude. *See Matter of de la Nues*, 18 I. & N. Dec. 140, 145 (BIA 1992); *In re Scarpulla*, 15 I. & N. Dec. 139, 140-141

(BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude."). The additional factual allegation for removal, lodged on August 17, 2000 [Ex. 1], is a 1987 conviction for petit larceny. The Respondent conceded under oath that she received this conviction during a period of chronic, almost daily shoplifting. The Respondent admitted that from 1987 until 1990, she shoplifted without being caught more than 1,000 times, in two different states. Given this admission, this Court considers the circumstances of the underlying grounds for removal to be a weighty negative factor in this discretionary analysis.

Second, the Respondent's lengthy criminal record, which stretches for more than fifteen years and across three states, constitutes additional evidence of bad character. The Respondent has more than thirty criminal misdemeanor convictions, many of them for petit larceny. She has been arrested in New York, New Jersey, and Pennsylvania, and she admitted under oath that she was involved in a shoplifting incident in Florida. Not only did the Respondent admit to continuing to shoplift after the birth of each of her children, but she continued to accrue criminal convictions after she was served with a notice to appear on June 12, 2000, when she was on notice that the government was trying to deport her. Her crimes have increased in severity: she pled guilty to burglary in the third degree in 2003 [Ex. 17], also a crime involving moral turpitude. *See de la Nues*, 18 I. & N. Dec. 140. Her criminal record includes a wide variety of crimes: in addition to her petit larceny convictions,

she has two convictions for endangering the welfare of a child. [Ex. 20.] This extensive and varied criminal record evidences bad character and tilts the scale of discretion sharply away from the Respondent.

The Court finds that the evidence indicative of the Respondent's bad character and undesirability as a[n] LPR outweighs any social and humane considerations presented on her behalf or on the behalf of her five U.S. citizen children. *See Matter of Marin*, 16 I. & N. Dec. 584-585. The Court therefore concludes that granting relief is not in the best interests of this country, and denies the Respondent's application for removal under INA § 240A(a) as a matter of discretion.

B. Waiver of Inadmissibility Pursuant to INA § 212(h)

Relief under INA § 212(h) is available to aliens in the United States *only* in conjunction with an application for adjustment of status. 8 C.F.R. § 1245.1(f); *Matter of Bernabella*, 13 I. & N. Dec. at 43-44. The Respondent, as an LPR placed in removal proceedings and found to be removable, would be eligible to apply for § 212(h) relief only if she were to have applied for adjustment of status in order to establish a new qualifying visa petition. *See In re Mendez-Moralez*, 21 I. & N. Dec. at 299. The Respondent did not submit an application for adjustment of status. This Court is bound by precedent decision of the BIA; consequently, this Court must deny the Respondent's § 212(h) petition as a matter of law.

The Respondent, through counsel, argues that her application for § 212(h) relief is not premised on her eligibility to apply for adjustment of status. Rather, she claims direct eligibility for relief under § 212(h) based on her entitlement to equal protection of the laws under the Fifth Amendment. [Ex. A.] However, this Court cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., U.S. v. Gonzalez-Roque*, 165 F. Supp. 2d 577, 583 (S.D.N.Y. 2001) rev'd on other grounds, 301 F.3d 39 (2nd Cir. 2002); *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I. & N. Dec. 529, 532 (BIA 1992). Because the Court cannot comment on the constitutionality of INA § 212(h) and its implementing regulations, and because the Respondent did not submit an application for adjustment of status as required under 8 C.F.R. § 1245.1(f), the Court denies Respondent's § 212(h) petition as a matter of law. Assuming *arguendo* that the Respondent meets her burden with reference to her § 212(h) application, the Court would deny the application as a matter of discretion for the reasons indicated in this decision.

VI. Conclusion

The Respondent's application for cancellation of removal under INA § 240A(a) is denied as a matter of discretion. The Court finds that the evidence of the Respondent's bad character and undesirability as an LPR outweighs any social and humane considerations presented on her behalf. The Respondent's application for waiver of inadmissibility under INA

§ 212(h) is denied as a matter of law, because she failed to file application for adjustment of status.

ORDER

IT IS HEREBY ORDERED that the Respondent's application for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that the Respondent's application for waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that the Respondent be removed to Guyana, based upon the charges contained in the Notice to Appear.

12/9/05
Date

/s/ ALAN L. PAGE
Alan L. Page
U.S. Immigration Judge

Constitutional Provisions:

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory provisions:

8 U.S.C, § 1101(a)(13); INA § 101(a)(13) –

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 212(d)(5) [8 USCS § 1182(d)(5)] or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,

(v) has committed an offense identified in section 212(a)(2) [8 USCS § 1182(a)(2)], unless since such offense the alien has been granted relief under section 212(h) or 240A(a) [8 USCS §§ 1182(h) or 1229b(a)], or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

8 U.S.C. § 1182; INA § 212(a)(2) – Criminal and related grounds of inadmissibility

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

(ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and

the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions. Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more, is inadmissible.

(C) Controlled substance traffickers. Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice. Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h) [8 USCS § 1101(h)]).

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized. For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

8 U.S.C. § 1182(h); INA § 212(h) – Nonapplicability of subsec. (a)(2)(A)(i)(I), (II), (B), (D), and (E).

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)

(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status, and

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States,

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

8 U.S.C. § 1229b; INA § 240A – Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents.

(1) In general. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1252 – Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney

General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other

than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in

every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

* * *

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. § 1255; INA § 245 – Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved peti-

tion for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal No. 07-1884-AG

JENNY LEE HENRY, a.k.a. Karen Allen, a.k.a. Karen Henry, a.k.a. Annette Williams, a.k.a. Andrea Scantlebury, a.k.a. Williams Sherlly, a.k.a. Jennylee Henry, a.k.a. Lorna Williams, a.k.a. Sharon Smith, a.k.a. Jennymary Henry, a.k.a. Shelly Williams, a.k.a. Williams,

Petitioner-Appellant,

v

MICHAEL B. MUKASEY,
Attorney General of The United States,

Respondent-Appellee.

MOTION TO STAY ISSUANCE OF THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Federal Rule of Appellate Procedure 41(d)(2), Petitioner-Appellant Jenny Lee Henry respectfully moves this Court to stay the issuance of the mandate for 90 days in the above-captioned appeal pending the filing of a petition for a writ of certiorari in the United States Supreme Court.[1]

Ms. Henry's petition for certiorari will present at least two substantial questions worthy of a grant of certiorari.

First, Ms. Henry's case raises a substantial and far-reaching issue of equal protection that is currently the subject of an inter-Circuit conflict—namely, whether the Immigration and Nationality Act ("INA") can exclude certain categories of Lawful Permanent Residents ("LPRs") from discretionary relief from removal solely on the basis of whether their request for relief is brought in exclusion or deportation proceedings. The Second and Eleventh Circuits have made clear that such a distinction, based on no more than that individual's physical location, violates the Equal Protection Clause; the Fifth and Seventh Circuits have taken the contrary position. *Compare Francis v. INS*, 532

[1] Federal Rule of Appellate Procedure 41(d)(2) provides that the stay "must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition." Ms. Henry intends to file a petition for certiorari within the prescribed 90-day period from the entry of judgment denying rehearing and will notify the clerk of the Court once she has done so. Sup. Ct. Rs. 13.2 & 12.3.

F.2d 268, 272-73 (2d Cir. 1976) (equal protection requires that INA Section 212(c) relief apply to LPRs in deportation as well as exclusion proceedings) *and Yeung v. INS*, 76 F.3d 337, 339-41 (11th Cir. 1995) (applying *Francis* to hold that a deportable alien who has not traveled abroad and who is ineligible to apply for adjustment of status is eligible for a Section 212(h) waiver) *with Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 503-06 (5th Cir. 2006) (finding no equal protection violation in limiting Section 212(h) relief to those in exclusion proceedings or those applying for adjustment of status); *and Klementanovsky v. Gonzales*, 501 F.3d 788, 791-94 (7th Cir. 2007) (same). As fully presented in her opening brief and at oral argument, as well as through her petition for rehearing/rehearing *en banc*, Ms. Henry was denied equal protection when the IJ held that she was ineligible for a Section 212(h) waiver simply because she had not departed and reentered the country subsequent to becoming deportable, or filed a concurrent application for an adjustment of status, a burden that would not have applied had she sought relief while in exclusion proceedings. *See* Pet'r Br. at 16-22; Reply Br. at 13-16; Rehearing Br. at 4-8.[2] Under the well-established law of

[2] Unless otherwise indicated, capitalized terms and acronyms are as defined in the Brief of Petitioner-Appellant Jenny Lee Henry, dated August 16, 2007 ("Pet'r Br."). The Brief for Respondent, dated October 17, 2007, is referred to herein as "Resp't Br." and the Reply Brief of Petitioner-Appellant, dated November 5, 2007, is referred to as "Reply Br." Ms. Henry's Petition for Panel Rehearing and Rehearing *En Banc*, dated March 28, 2008, is referred to as "Rehearing Br."

this Circuit, it is impermissible to draw such a distinction based on nothing other than whether an LPR seeks discretionary relief in deportation proceedings versus exclusion proceedings.[3] *See Francis*, 532 F.2d at 272-73; *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007) (Section 212(c) waiver must be made available to an LPR whose crime renders her deportable as long as the same crime would render her excludable).

Ms. Henry's petition for certiorari will provide the Supreme Court with an opportunity to reconcile the disparate Circuit decisions on this important question. Moreover, her petition will raise a substantial question of equal protection, impacting not only her own case but potentially thousands of similarly situated LPRs, whose ability to seek relief from removal turns on the outcome of the question presented here.[4]

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[3] The denial of equal protection inherent in the Board of Immigration Appeals' denial of Section 212(c) relief here was fully briefed in Ms. Henry's petition for review and again in her petition for rehearing/rehearing *en banc*. Although this Court did not address the equal protection issue in its summary order denying a petition for review, *Henry v. Mukasey*, No. 07-1884-ag, 2008 WL 376389 (2d Cir. Feb. 11, 2008), or in its denial of a petition for rehearing/rehearing *en banc*, *Henry v. Mukasey*, No. 07-1884-ag (2d Cir. May 23, 2008), if it had addressed the equal protection issue, the well-established law of this Circuit would have required a reversal or remand in Ms. Henry's case under *Francis* and *Blake*, and consistent with the Eleventh Circuit in *Yeung*.

[4] Petitions for writs of certiorari that present issues about which the Courts of Appeals disagree are one of the enumerated categories of petitions that warrant Supreme Court review. *See* Sup. Ct. R. 10(a).

As a related matter, Ms. Henry's petition will also present the question of whether a Court of Appeals violates a petitioner's due process rights when it fails to address a key issue at the heart of a petition for review—here, the equal protection question squarely presented but never considered by the panel, which denied a petition for review and, later, a petition for rehearing/rehearing *en banc* without *ever* addressing the equal protection raised in the briefs and during oral argument. Not only does the Circuit's well-established jurisprudence warrant a ruling in Ms. Henry's favor, but the panel's failure to address the issue constitutes a violation of Ms. Henry's due process right to have this Court consider the legal issues presented in her petition for review. That concern is heightened here, as this forum constitutes the *sole* opportunity for Ms. Henry to bring her case before a federal forum.[5]

Second, Ms. Henry's petition for certiorari will present the question of whether an IJ is required to make a finding on the issue of extreme hardship

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[5] Indeed, only federal courts—the the agencies—can consider questions of constitutional law. *See, e.g., United States v. Gonzalez-Roque*, 165 F.Supp. 2d 577, 583 (S.D.N.Y. 2001) rev'd on other grounds, 301 F.3d 39 (2d Cir. 2002). The panel, exclusively charged with addressing Ms. Henry's equal protection claim, did not address the issue because it treated the entirety of her petition as a challenge to the IJ's discretion. *Henry*, 2008 WL 376389, at *1. But equal protection is a constitutional claim (and, *a fortiori*, a question of law) that the Court clearly has jurisdiction to review under 8 U.S.C. Section 1252(a)(2)(D).

under Section 212(h) prior to deciding whether a waiver is warranted as a matter of discretion. *See* Pet'r Br. at 22-26; Reply Br. at 16-19. The issue is one of constitutional and federal law—whether the IJ must address the issue of extreme hardship before applying his discretion under Section 212(h)—and is a substantial question warranting Supreme Court review because foregoing the extreme hardship analysis contravenes congressional intent and constitutes a violation of due process.

Finally, there is good cause for a stay, as the balance of equities tips in favor of granting a stay of the issuance of the mandate. In particular, once the mandate issues, the Office of Immigration and Customs Enforcement may execute Ms. Henry's order of removal and deport her to Guyana immediately, causing severe hardship to her and her five United States citizen daughters (four of whom are still minors). Ms. Henry has been continuously present in the United States for 24 years and has no family or other significant connections to Guyana. For its part, the United States government would not suffer any significant inconvenience or hardship if Ms. Henry remained in the country pending the outcome of her petition for certiorari, particularly where, as here, the petitioner is under incarceration.

For these reasons, the motion to stay the issuance of the mandate should be granted.

BACKGROUND[6]

Upon being charged with deportability pursuant to Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act ("INA") as an admitted alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, Ms. Henry, a native and citizen of Guyana, unsuccessfully sought (on timeliness grounds) an application for cancellation of removal under INA Section 240(A)(a). After the BIA denied her appeal and subsequent motion to reconsider, she successfully sought a writ of *habeas corpus* from the United States District Court of the Southern District of New York, which vacated her order of removal and remanded the case so that Ms. Henry could file applications for cancellation of removal pursuant to INA Section 240(A)(a) and for a waiver of inadmissibility pursuant to INA Section 212(h). *See Henry v. Ashcroft*, 175 F.Supp.2d 688 (S.D.N.Y. 2001).

On December 9, 2005, the IJ denied Ms. Henry's application for cancellation of removal under INA Section 240(A)(a) and Ms. Henry's application for waiver of inadmissibility under INA Section 212(h). The IJ also ordered Ms. Henry removed to Guyana. On September 21, 2006, Ms. Henry appealed the IJ decision to the BIA. The BIA dis-

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[6] The factual background and procedural history is set forth in full in Ms. Henry's principal brief on appeal. *See* Pet'r Br. at 5-14. In the interest of avoiding unnecessary repetition, only the most pertinent facts are recited here.

missed Ms. Henry's appeal of the IJ's decision, and Ms. Henry brought a petition for review in this Court. A three-judge panel denied Ms. Henry's petition for review on February 11, 2008, and her petition for panel rehearing and rehearing *en banc* was denied on May 23, 2008.

ARGUMENT

This Court has the power to stay the issuance of the mandate pending the filing of a petition for a writ of certiorari. 28 U.S.C. § 2101(f). A stay pending the filing of a petition for a writ of certiorari may be granted where "the certiorari petition would present a substantial question and there is good cause for a stay." Fed. R. App. P. 41(d)(2).

I. Ms. Henry's Case Raises Substantial Questions Warranting Supreme Court Review

A. Ms. Henry's Section 212(h) Claim Presents A Substantial Question of Equal Protection

Ms. Henry's petition for certiorari will argue that to distinguish between classes of LPRs such that those in exclusion proceedings are eligible for discretionary relief, while those (like Ms. Henry) in deportation proceedings are not, violates equal protection. That conclusion flows naturally from this Circuit's previous decisions in *Francis*, 532 F.2d at 272-73, and *Blake*, 489 F.3d at 100-01, and was specifically so held by the Eleventh Circuit in *Yeung*, 76 F.3d at 339-41.

In *Francis*, this Court held that INA Section 212(c)—a statutory provision that, like INA Section 212(h), was intended to provide an opportunity for the Attorney General, in his discretion, to waive certain grounds for excludability for aliens seeking entry into the United States—applies to LPRs regardless of whether they are in exclusion or deportation proceedings. *Francis* rejects the proposition that eligibility for relief can turn on the simple fact of whether the individual seeking relief happens to be in deportation proceedings or exclusion proceedings. *See Francis*, 532 F.2d at 272. In *Blake*, the Second Circuit extended *Francis* by allowing LPRs deportable as aggravated felons to apply for discretionary relief under INA Section 212(c) so as not to prevent those individuals from seeking relief otherwise available to similarly situated LPRs in exclusion proceedings. The *Blake* court made clear that it was "bound by *Francis*'s mandate to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" 489 F.3d at 104.

Relying heavily on this Court's decision in *Francis*, the U.S. Court of Appeals for the Eleventh Circuit held, similarly, that a distinction under Section 212(h) based solely on an alien's decision to travel outside of the United States violates equal protection. *Yeung*, 76 F.3d at 339-41. In that case, the Eleventh Circuit rejected the proposition that a petitioner who had neither left the country nor applied for adjustment of status was ineligible to apply for a Section 212(h) waiver. *Id.* The Second Circuit's decisions in *Francis* and *Blake* and Eleventh Circuit's decision in *Yeung* conflict the law of the Fifth and

Seventh Circuits. *See Malagon de Fuentes*, 462 F.3d at 504 (limiting Section 212(h) relief to those in exclusion proceedings or those applying for adjustment of status does not violate equal protection); *Klementanovsky*, 501 F.3d at 791-94 (same).

Ms. Henry will urge the Supreme Court to resolve the split by adopting the rules of the Second and Eleventh Circuits to hold that an LPR need not leave the country or file a concurrent application for adjustment of status to be eligible for a Section 212(h). In this case, the decision that Ms. Henry was ineligible for Section 212(h) relief because she was neither in exclusion proceedings nor had applied for a concurrent application for adjustment of status upon being placed in removal proceedings undermines the well-settled equal protection law of this Circuit. Under the IJ's interpretation of INA Section 212(h), had Ms. Henry left the United States after the convictions that rendered her deportable and later sought readmission, she would have been eligible for Section 212(h) relief without an application for adjustment of status. Indeed, the *sole* basis for finding that Ms. Henry was ineligible for a Section 212(h) waiver was that she had not departed the United States before she applied for this relief. This ruling stands in stark contradiction to *Francis* and *Blake*, and there is a likelihood that the Supreme Court will grant certiorari to resolve the issue in Ms. Henry's favor because, as this Court has made clear, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that [s]he has never departed since [her] initial entry should receive at least as much consideration as an

individual who may leave and return from time to time." *Francis*, 532 F.2d at 273.

Although Ms. Henry fully presented her equal protection claim both in briefing and during oral argument, *see, e.g.*, Pet'r Br. at 16-22; Reply Br. at 13-16, the panel failed to address the argument in its summary order denying her petition for review, *see Henry*, 2008 WL 376389, at **1-2, and again when it denied her petition for rehearing/rehearing *en banc*. *Henry v. Mukasey*, No. 07-1884-ag (2d Cir. May 23, 2008).

The panel's failure to address the equal protection issue is *itself* a basis for seeking Supreme Court review, as Courts of Appeals must consider all serious issues presented in a petition for review. *See Brown Shoe Co. v. U.S.*, 370 U.S. 294, 355 (1962) (Clark, J., concurring) (the "function of a Court of Appeals" is "to examin[e] the whole record and resolv[e] all questions"). This is especially important where, as here, (i) the petition for review presents an immigration petitioner's *sole* opportunity for federal review of questions incident to an order of removal and (ii) only the federal court (not the agency) can address the constitutional question raised herein. *See, e.g., Gonzalez-Roque*, 165 F. Supp. 2d at 583. As in all federal appeals, but especially here, Ms. Henry must receive a full and fair opportunity to litigate all legal issues relevant to her case.[7]

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[7] The fact that this Court did not address the equal protection issue does not preclude Supreme Court review of the question. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'").

B. Section 212(h) And Due Process Require A Finding Whether Ms. Henry's United States Citizen Children Would Suffer Extreme Hardship If Ms. Henry Were Deported

In addition to Ms. Henry's equal protection claim, she also argues that Section 212(h) and due process require that the IJ address the statutory eligibility requirement of extreme hardship before turning to any discretionary factors. *See* Pet'r Br. at 22-26; Reply Br. at 16-19. Because a finding of extreme hardship by the IJ is a factor that would tilt the balance of equities in an applicant's favor, squarely addressing that issue is a legal requisite before turning to the discretionary analysis under the statute. *See In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (BIA 1996). The question of whether an IJ must first address the issue of extreme hardship, as required by the statute, INA § 212(h); 8 U.S.C. § 1182(h), is a substantial legal issue meriting Supreme Court review. Indeed, allowing an IJ to proceed directly to the balance of equities (which the IJ effectively did here) would undermine Congress's intent and grant the IJ unfettered discretion to deny Section 212(h) relief without review of the question of extreme hardship even where such hardship was present.

Here, the panel relied on the IJ's dicta addressing the separate "severe" hardship finding in relation to Ms. Henry's cancellation of removal petition. However, the IJ's discussion of Ms. Henry's "severe" hardship did not satisfy his obligation to address

"extreme" hardship under Section 212(h). *See Bastanipour v. INS*, 980 F.2d 1129, 1130-31 (7th Cir. 2007) (IJ may not import findings from one application for relief from removal in order to "fill the gap" in another). The Supreme Court has emphasized that "Congress 'says in a statute what it means and means in a statute what it says there,'" and here Ms. Henry's certiorari petition will argue that when Congress said in Section 212(h) that an IJ must determine "extreme hardship" it meant just that. *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000).

II. MS. HENRY'S CASE PRESENTS GOOD CAUSE FOR A STAY PENDING FILING OF A PETITION FOR CERTIORARI

Ms. Henry also meets the "good cause" requirement for a stay, as the balance of equities tips in favor of granting a stay of the issuance of the mandate. Courts have recognized that removal carries great hardship. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."). Removal here would result in Ms. Henry's separation from her family (all but one of whom currently reside in the United States), and in particular from her five U.S. citizen daughters for whom she has been the sole caretaker. Moreover, Ms. Henry

would be forced to leave her adopted country of 24 years and return to a country where she has no ties, no employment, and no place to live. Ms. Henry's removal would also result in severe hardship for her five daughters (four of whom are minors), who would be faced with the choice of remaining in the United States without a mother and possibly being separated in foster care (a scenario that both the IJ and the government recognized as likely, JA 000483 (Tr. at 305), or returning to a country they have never visited and where, as the IJ recognized, their opportunities would be significantly limited. JA 000167 (IJ Dec. at 17)). To this effect, the IJ found that"[t]here is strong evidence that [Ms. Henry] and her family, including her five U.S. citizen children and her mother, would suffer hardship if removal occurs." *Id.* Similarly, the IJ noted, "There is no doubt that [Ms. Henry's] removal could cause severe emotional and economic hardship to [Ms. Henry's] family. . . ." *Id.*

In contrast to the hardship that Ms. Henry would suffer upon removal, the U.S. Government would not suffer any significant injury if Ms. Henry were permitted to remain in the United States while her petition for certiorari remains pending, not least because she remains incarcerated in immigration detention at this time. Indeed, the Second Circuit has held that "[o]rdinarily . . . it is deemed that [removal] is an irreparable harm, and that the [government] suffers no offsetting injury." *Ofosu v. McElroy*, 98 F.3d 694, 699 (2d Cir. 1996). Under the circumstances, good cause is certainly established here.

CONCLUSION

For the foregoing reasons, Ms. Henry respectfully requests that the Court grant this motion for a stay of the issuance of the mandate pending the filing of a petition for a writ of certiorari with the Supreme Court.

Dated: New York, New York
May 30, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

07-1884-AG

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Petitioner-Appellant,

v

MICHAEL B. MUKASEY,
Attorney General of The United States,

Respondent-Appellee.

ON APPEAL FROM
THE BOARD OF IMMIGRATION APPEALS

PETITION OF PETITIONER-APPELLANT JENNY LEE HENRY FOR PANEL REHEARING AND REHEARING *EN BANC*

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STATEMENT PURSUANT TO FED. R. APP. P. 35(B)(1)

Petitioner-Appellant Jenny Lee Henry, through her undersigned counsel, seeks panel rehearing and rehearing *en banc* of her petition for review, which was denied by summary order on February 11, 2008. *See Henry v. Mukasey*, No. 07-1884-ag, 2008 WL 376389 (2d Cir. Feb. 11, 2008) (appended hereto). Ms. Henry's petition should be reheard on the grounds that the panel denied Ms. Henry's petition without addressing two issues of exceptional importance that were briefed in her moving papers and discussed at oral argument: (i) whether she was denied equal protection because the IJ held that she was ineligible for a Section 212(h) waiver of inadmissibility based on her failure to concurrently apply for adjustment of status; and (ii) whether the IJ was statutorily required under INA Section 212(h) to address the issue of "extreme hardship" before balancing discretionary factors.[1]

First, as presented in her opening brief, Ms. Henry was denied equal protection when the IJ held that she was ineligible for a Section 212(h) waiver simply because she had not departed and reentered the country subsequent to becoming deportable and also had not made a concurrent

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[1] Unless otherwise indicated, capitalized terms and acronyms are as defined in the Brief of Petitioner-Appellant Jenny Lee Henry, dated August 16, 2007 ("Pet'r Br."). The Brief for Respondent, dated October 17, 2007, is referred to herein as "Resp't Br." and the Reply Brief of Petitioner-Appellant, dated November 5, 2007, is referred to as "Reply Br."

application for an adjustment of status. *See* Pet'r Br. at 16-22; Reply Br. at 13-16. This was legal error, as the Second Circuit has held that similar distinctions between lawful permanent residents ("LPRs")—based on whether the LPR was inside the United States challenging deportation as opposed to outside the country challenging exclusion—are arbitrary and without rational basis. *See Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976) (equal protection requires that INA Section 212(c) relief apply to LPRs in deportation as well as exclusion proceedings); *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007) (Section 212(c) waiver must be made available to an LPR whose crime renders her deportable as long as the same crime would render her excludable). Here, the panel did not address Ms. Henry's equal protection argument because it treated the entirety of her petition as a challenge to the IJ's discretion. *Henry*, 2008 WL 376389, at *1. But equal protection is a constitutional claim and a question of law that the Court clearly has jurisdiction to review under 8 U.S.C. § 1252(a)(2)(D). Moreover, the particular equal protection claim here is of exceptional importance given the current lack of consensus by those circuits that have previously considered the identical issue. *Compare Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995) (holding that a deportable alien who has not traveled abroad and who is ineligible to apply for adjustment of status is eligible for a Section 212(h) waiver) *with Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2006) (limiting Section 212(h) relief to those in exclusion proceedings or those applying for adjustment of status does not

violate equal protection); *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007) (same).

Second, Ms. Henry argued that the IJ was required to make a finding on the issue of extreme hardship under Section 212(h) prior to deciding whether a waiver was warranted as a matter of discretion. *See* Pet'r Br. at 22-26; Reply Br. at 16-19. Addressing extreme hardship as a threshold issue is required by the statute and due process because, if extreme hardship is established, it is a favorable factor to be considered by the IJ when exercising his discretion. *See In re Mendez Morales*, 21 I. & N. Dec. 296, 301 (BIA 1996). Like Ms. Henry's equal protection claim, the Court did not address this issue of statutory construction and due process and instead characterized the argument as a challenge to the IJ's discretion. *See* Pet'r Br. at 22-26; Reply Br. at 16-19. But the unaddressed question is one of constitutional and federal law—whether the IJ must address the issue of extreme hardship before applying his discretion under Section 212(h)—and it is of exceptional importance because foregoing the extreme hardship analysis contravenes Congressional intent and constitutes a violation of due process.

In short, Ms. Henry's case presents two questions of exceptional importance to the immigration laws of the United States, which should be reconsidered by the panel or, in the alternative, reheard by the entire Court.

ISSUES PRESENTED

1. Whether the Court erred in failing to address and failing to hold that equal protection under the Fifth Amendment to the U.S. Constitution requires Ms. Henry to be eligible for relief under INA Section 212(h) (8 U.S.C. § 1182(h)) without filing a concurrent application for adjustment of status.

2. Whether the Court erred in failing to address and failing to hold that the IJ and the BIA committed legal error and violated Ms. Henry's procedural due process rights under the Fifth Amendment to the U.S. Constitution by not addressing "extreme hardship" under INA Section 212(h) (8 U.S.C. § 1182(h)).

ARGUMENT

I. MS. HENRY IS ELIGIBLE FOR A SECTION 212(H) WAIVER AS A MATTER OF EQUAL PROTECTION

Under well-established precedents of this Court, Ms. Henry must be statutorily eligible for a Section 212(h) waiver as a matter of equal protection.[2]

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[2] Pursuant to INA Section 212(h), the Attorney General may, in his discretion, waive certain grounds of exclusion, including convictions for crimes of moral turpitude, if: "In the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence . . . it is established to the satisfaction of the Attorney General that the alien's [exclusion] would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien." INA § 212(h)(1)(B); 8 U.S.C. § 1182(h)(1)(B).

Nevertheless, the IJ held that Ms. Henry was ineligible for Section 212(h) relief because she had not applied for a concurrent application for adjustment of status. JA 000170 (IJ Dec. at 20) (citing *In re Bernabella*, 13 I. & N. Dec. 42, 43-44 (BIA 1968)). Ms. Henry, a citizen of Guyana and admitted into the United States as an LPR in 1984, had applied for a Section 212(h) waiver after she was placed in removal proceedings following misdemeanor convictions for shoplifting. JA at 000151-53 (IJ Dec. at 1-3).[3] Under the IJ's interpretation of INA Section 212(h), had Ms. Henry left the United States after the convictions that rendered her deportable and later sought readmission, she would have been eligible for Section 212(h) relief without an application for adjustment of status. *See In re Abosi*, 24 I. & N. Dec. 204, 205 (BIA 2007) (holding that a returning LPR seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with a Section 212(h) waiver). As a result, the sole basis for the finding that Ms. Henry was ineligible for Section 212(h) waiver was that she had not departed the United States when she applied for this relief.

Ms. Henry argued on appeal that the IJ's finding that she was ineligible for Section 212(h) relief on this basis was a violation of equal protection. *See*

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[3] The factual background and procedural history of Ms. Henry's application for a Section 212(h) waiver and her petition for review before the Court is set forth in full in her principal brief on appeal. *See* Pet'r Br. at 5-14. In the interest of avoiding unnecessary repetition, only the most pertinent facts are recited here.

Pet'r Br. at 16-22; Reply Br. at 13-16. Nevertheless, the panel's summary order failed to address the argument, *Henry*, 2008 WL 376389, at **1-2, notwithstanding that the Court plainly had jurisdiction to address Ms. Henry's constitutional claim. 8 U.S.C. § 1252(a)(2)(D). And the issue is of particular significance because there is Second Circuit authority that requires reversal of the IJ's decision.

As this Court held in *Francis*, 532 F.2d at 272-73, and recently reaffirmed in *Blake*, 489 F.3d at 100-01, a distinction premised solely on whether an alien has departed and returned to the country (the same distinction made by the IJ here) violates equal protection because it is without rational basis.[4] In *Francis*, this Court examined INA Section 212(c), a statutory provision that, like INA Section 212(h), was intended to provide an opportunity for the Attorney General, in his discretion, to waive certain grounds of excludability for aliens seeking entry into the United States. *See Francis*, 532 F.2d at 272 (noting Congress's concern that "there be some degree of flexibility to permit worthy returning aliens to continue their relationships with family members in the United States despite a ground for exclusion"). As with Section 212(h), the INS had expanded the reach of Section 212(c) to deportable aliens, based on its

[4] Federal classifications of aliens are subject to a rational basis standard of review. *See Francis*, 532 F.2d at 272. Pursuant to such scrutiny, "distinctions between different classes of persons must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Id.*

recognition "that these considerations apply with equal force to an alien who has already reentered." *Id.* In *Francis*, this Court held that once the benefits of this statute were expanded to deportable individuals, the government could not hinge eligibility on random factual distinctions such as whether the alien had traveled outside of the country. *Id.* at 273 ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

The Court recently reaffirmed the equal protection principle embodied by *Francis* and *Blake*. 489 F.3d at 100 (holding that the BIA's "comparable grounds" for granting Section 212(c) relief to aliens in deportation proceedings failed to comport with *Francis*). In that case, the Second Circuit made clear that it was "bound by *Francis*'s mandate to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Id.* at 104 (citation omitted).

The Court's reasoning in the Section 212(c) cases applies with equal force to the Section 212(h) context here. Indeed, relying heavily on this Court's decision in *Francis*, the U.S. Court of Appeals for the Eleventh Circuit squarely held that a distinction under Section 212(h) based on an alien's decision to travel outside of the United States violates equal protection. *Yeung*, 76 F.3d at 339-41. In that case, the Eleventh Circuit found that a petitioner who had neither left the country nor applied for adjustment of status was eligible for a Section 212(h) waiver. *Id.* As Ms. Henry has

argued on appeal, the Second Circuit should adopt the same application of *Francis* here.[5]

II. SECTION 212(H) AND DUE PROCESS REQUIRE A FINDING WHETHER MS. HENRY'S UNITED STATES CITIZEN CHILDREN WOULD SUFFER EXTREME HARDSHIP IF MS. HENRY WERE DEPORTED

A. The Panel Failed To Address Whether The IJ Was Required To Make A Finding On The Issue Of "Extreme Hardship" Under Section 212(h) Before Weighing Discretionary Factors

In denying Ms. Henry's petition for review, the panel did not address whether principles of statutory construction and due process require an IJ to address the threshold issue of "extreme hardship" prior to exercising his or her discretion to grant a waiver under INA Section 212(h). *See* Pet'r Br. at 22-26; Reply Br. at 16-19. Instead, in holding that it lacked jurisdiction, the panel stated that "Henry does not argue that the BIA erred by failing to determine her statutory eligibility for Section 212(h) relief." *Henry*, 2008 WL 376389, at *1. In fact, Ms. Henry *does* argue that Section 212(h) and due process mandate that the IJ address the statutory eligibility requirement of

[5] As discussed above, there is a Circuit split between the Eleventh Circuit holding in *Yeung* and the Fifth and Seventh Circuits. *Cf. Malagon de Fuentes*, 462 F.3d at 504; *Klementanovsky*, 501 F.3d at 794. For this reason, among others, it is of exceptional importance that the Court rehear its decision and hold that *Francis* requires that an LPR who has not left the country is eligible for a Section 212(h) waiver without a concurrent application for adjustment of status.

extreme hardship before turning to any discretionary factors. *See* Pet'r Br. at 22-26; Reply Br. at 16-19.

It is of course true that a finding of extreme hardship in the context of statutorily eligibility would be one factor that would affect the balance of equities in Ms. Henry's favor. *See In re Mendez-Moralez*, 21 I. & N. Dec. at 301. Nevertheless, the issue whether the IJ was required to address extreme hardship as a threshold issue is distinct from a challenge to the IJ's actual balance of all discretionary factors. The former issue is plainly a question within the Court's jurisdiction, *see* 8. U.S.C. § 1252(a)(2)(D), and the panel should have addressed it.

B. The IJ's Dicta On Hardship In The Context Of Cancellation Of Removal Are Not Sufficient Under Section 212(h)

While the IJ made no finding as to extreme hardship when addressing Ms. Henry's application for a Section 212(h) waiver, in the context of Ms. Henry's application for *cancellation of removal*—which, notably, does *not* include extreme hardship as an element of statutory eligibility or as a discretionary factor—the IJ merely observed that Ms. Henry's five American citizen daughters would suffer "hardship," as well as "severe" hardship, if she were removed. JA 000167 (IJ Dec. at 17); INA § 240A(a); 8. U.S.C. § 1229(a).[6] The panel relied upon these dicta, in the

[6] Specifically, the IJ recognized that it was unlikely that one of Ms. Henry's daughter's would receive the same level of medical treatment in Guyana and further recognized that the opportunities for all of Ms. Henry's daughters would be far

context of the cancellation of removal application, to conclude that the IJ made a finding of extreme hardship before weighing the discretionary component of Ms. Henry's application for Section 212(h) relief. *Henry*, 2008 WL 376389, at *1. However, the IJ's dicta in the cancellation of removal context under INA Section 240A(a) were no substitute for addressing extreme hardship under INA Section 212(h).

As an initial matter, "severe" hardship is not even a standard contemplated by the provisions of the INA. *See, e.g.*, INA § 212(h) (requiring a finding of "extreme" hardship); INA § 240A(b); 8 U.S.C. § 1229b(b) (referring to "exceptional and extremely unusual" hardship). That C ngress intentionally chose specific levels of hardship for particular forms of relief from removal therefore belies the panel's conclusion that the IJ's finding of hardship or "severe" hardship in the context of cancellation of removal was the equivalent of a finding of "extreme" hardship. *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there'"). Indeed, the Supreme Court has affirmed that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is gen-

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more limited than opportunities in the United States. *Id.*; *see also* JA 000283 at (Tr. at 105); JA at 000566 (Tr. at 387). Moreover, during the administrative proceedings, both the IJ and the Government admitted that if Ms. Henry's daughters remained in the United States, the likely outcome would be that they would be separated in foster care. JA 000483 (Tr. at 305).

orally presumed that Congress acts intentionally and purposely." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004). Moreover, even if "severe" hardship had some legal significance, as the Seventh Circuit held in *Bustamipour v. INS*, 980 F.2d 1129, 1130-31, an IJ may not import findings from one application for relief from removal in order to "fill the gap" in another.[1] Thus, the IJ's finding of "severe hardship" in the context of Ms. Henry's cancellation of removal application did not satisfy his obligation to address "extreme hardship" under INA Section 212(h).

C. Bagamasbad Is Distinguishable

*In dicta contained in the decision denying review, the panel cited INS v. Bagamasbad for the proposition that "the agency need not rule on issues of statutory eligibility prior to determining whether to grant a discretionary form of relief." Henry, 2008 WL 2176389, at *1 (citing INS v. Bagamasbad, 429 U.S. 24, 25 (1976)). However, the principle articulated in Bagamasbad does not apply here.*

[1] *The summary order states that Bustamipour does not support Ms. Henry's argument because that case was reviewable for abuse of discretion, while Ms. Henry's case is not. Henry, 2008 WL 2176389, at *2 n.3. Nevertheless, Ms. Henry does not rely on Bustamipour for the proposition that the IJ's discretionary findings were flawed and merited review, but for the proposition that the IJ's finding of hardship in the context of her cancellation application was an insufficient finding with respect to her Section 212(h) application.*

The concern underlying the holding in *Bagamasbad* is that an agency should not be required to rule on extraneous questions. This issue is not implicated here because not only is addressing extreme hardship necessary to determine whether Ms. Henry is eligible for Section 212(h) relief but also a finding of extreme hardship is *a fortiori* a favorable factor in the IJ's discretionary analysis. INA § 212(h)(1)(B); 8 U.S.C. § 1182(h)(1)(B); *In re Mendez Morales*, 21 I. & N. Dec. at 301. In contrast, the petitioner in *Bagamasbad* conceded that the application would have been denied even if the IJ had made a finding of statutory eligibility. 429 U.S. at 26. Here, Ms. Henry argued, and continues to argue, that the IJ's decision on her Section 212(h) waiver might have reached a different result had the IJ addressed the issue of extreme hardship.

Finally, it is worth noting that because the IJ's discretionary analysis cannot be reviewed, if he is able to forego the statutory eligibility analysis under INA Section 212(h), where a favorable finding will necessarily impact the discretionary analysis, the entire application is rendered unreviewable even when the petitioner's statutory and constitutional rights may have been violated. Such a result is inconsistent with the Court's jurisdiction under the INA and basic principles of due process.

* * *

Whether the IJ would have ultimately come to the same conclusion after addressing extreme hardship is speculative at this stage. *See Bastanipour*, 980

F.2d at 1130-31 (remanding the BIA's denial of asylum, notwithstanding its findings concerning the denial of an alternative application for Section 212(c) relief, because the balancing of factors might incline differently had the BIA made explicit findings on the statutory asylum issues). For this reason, and for those stated above, the failure of the IJ to address extreme hardship with respect to Ms. Henry's application for a Section 212(h) waiver requires remand. *See Li v. INS*, 453 F.3d 129, 141 (2d Cir. 2006) (requiring remand to the BIA because "we cannot state with confidence that the BIA would reach the same result in the absence of errors.")

CONCLUSION

For the foregoing reasons, Ms. Henry respectfully requests that the Court grant this petition for panel rehearing and rehearing en banc, vacate the panel order in Henry v. Mukasey, 2008 WL 376389, and remand the case to the BIA with instructions to return the matter to the IJ for a new determination of Ms. Henry's application for a Section 212(h) waiver.

Dated: *New York, New York*
March 27, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 32(a), 35(b)(2), and 40(b)

1. This brief complies with Federal Rule of Appellate Procedure 35(b)(2) and 40(b) because it does not exceed fifteen pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman font.

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U.S. COURT OF APPEALS

.....X

IN THE MATTER OF

JENNY LEE HENRY,

Petitioner,

Case No.
1705

- Vs. -

ALBERTO GONZALES,

Respondent.

.....X

February 1, 2008

APPEARANCES: MS. TANISHA MASSIE, ESQUIRE
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WITNESS	DIRECT	CROSS	RE DIRECT	RE CROSS	V. D.	J. J.

EXHIBITS

Petitioner	Description	For I.D.	In Ev.

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[START TAPE 1 SIDE A]

THE COURT: The next item on our calendar is Jenny Lee Henry versus Alberto Gonzales, soon to be changed to Michael Mukasey. Thank you. Good morning.

MS. TANISHA MASSIE: Good morning. May it please the Court, Tanisha Massie, Cleary Gottlieb Steen & Hamilton, along with my colleagues; Mitchell Lowenthal, Claire de Saint Vin–, de Saint Vincent, and Alida Lasker. Good morning.

THE COURT: Good morning.

MS. TANISHA MASSIE: We're here today for two reasons. The first is to ask that this Court find and remedy the constitutional violations that occurred when Ms. Henry's Section 212(h) waiver was denied by the immigration judge and affirmed by the Board of Immigration Appeals. It is the law of this circuit that two similarly situated, lawful, permanent residents should not be treated differently for arbitrary reasons. Currently the law is that an—an—an— permanent resident who has depart-

ed the—the country, but who has, uh, is allowed to apply for a 212(h) waiver without having to apply for adjustment of status. Ms. Henry, unfortunately, did not apply, uh, did not depart the

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United States, and as a consequence—

THE COURT: [Interposing] And you're familiar with our recent decision of Blake v. Carbon, which—

MS. TANISHA MASSIE: [Interposing] Yes. Yes.

THE COURT: —uh, seemed to wipe out those distinctions. Yes, but deal with the issue of both the IJ and the BIA saying, even if we reach the 212(h), this is discretionary and we would not grant this relief to this petitioner.

MS. TANISHA MASSIE: Well, Your Honor, uh, as we've argued in our papers, it is insufficient that the—the immigration judge simply said that he—he simply said that he would use the same rationale to deny, uh, the 212(h) waiver if Ms. Henry had been found to be eligible. The same rationale that he used to deny cancellation of removal. Those are two completely different waivers, and—

THE COURT: [Interposing] But tell me how the, uh, criteria are different. Isn't it still a balancing of, uh, benefits and harms?

MS. TANISHA MASSIE: Ultimately it is still a balancing. However, when we're dealing with a 212(h) waiver, one of the statutory eligibility requirements is that there's extreme hardship, and

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that extreme hardship then becomes one of the factors that—

THE COURT: [Interposing] But they found that there was hardship, as there is in every case when a mother with, uh, American citizen children is removed. Uh, the—they admitted that there was hardship, but both of the decision makers found that, um, that was balanced by, um, her criminal record.

MS. TANISHA MASSIE: Yes, Your Honor, but there are different types of hardship, there are different levels of hardship,and there are different levels of hardship with—

THE COURT: [Interposing] Isn't that a matter of viewer discretion? Aren't you really arguing they didn't count it enough, and isn't that one of the issues on which we do not have jurisdiction?

MS. TANISHA MASSIE: No, Your Honor. I—I don't think it's simply a matter of not counting it enough. Again, there was some level of—

THE COURT: [Interposing] Well, you said there are different levels—

MS. TANISHA MASSIE: —hardship that was found, but there—we don't know exactly what that is. There are two—

THE COURT: [Interposing] Uh, is—is—do we

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even have the right to ask?

MS. TANISHA MASSIE: Yes, we do have the right to ask that question. I think specifically because extreme hardship is a specific term under the immigration laws, as is exceptual—exceptional and extremely unusual hardship. The judge—the immigration judge did not make a determination of whether or not there was extreme hardship, and

the fact that he then said that instead of going through this analysis he had instead substituted his analysis for cancellation of removal. That is a question of law that is reviewable by this court.

THE COURT: That's the wrong standard. You're saying he used the wrong standard.

MS. TANISHA MASSIE: Not only did he use the wrong standard, but it was—it—he failed to apply the law. He failed to make a finding that he was supposed to make—

THE COURT: [Interposing] Well, aren't you really just saying that what you want him to—what he should have done, he had to articulate the words, uh, I find no extreme hardship, or I find extreme hardship, but nevertheless in the exercise of my discretion I don't find this an appropriate case? Uh, he didn't articulate those express words, but w—,

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what—can you point us to a case or a regulation, something that says he has to articulate those words on the record? Because the record has a lot of evidence that he, uh, that he considered the question of hardship. He says I've reviewed the record as a whole, including the social and humane considerations involved. There is evidence of hardship, uh, to this family if removal occur—uh, occurs, there is strong evidence that the respondent and her family, including her five minor U.S. citizen ch–, children would suffer a hardship, and he goes on to list specific factors. So where d–, where is he required to articulate the precise words, extreme hardship in a finding that other-

wise seems to be about hardship and a balancing of the equities?

MS. TANISHA MASSIE: Well, I think that if—if—if only the immigration laws that were not important to articulate whether or not a certain level of hardship would—needed to be reached, then I—I, uh, then there would not be different—of hardship under the immigration laws. It's there for a reason. There are different levels of hardship. The judge used the term severe hardship in his decision, but quite frankly that's not one of the

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levels of hardship that we're dealing with. Particularly about with 212—the Section 212(h)—. The—the statutory—the statute requires, um, that—show that there has been extreme hardship. We don't know whether or not Ms. Henry had been sh–, had shown extreme hardship. If she had shown extreme hardship, then by definition the judge would have used extreme hardship as one of the factors that he, uh, in his balancing of—of—and determination of whether or not Ms. Henry merited, uh, a Section 212(c) dec–, excuse me, 212(h) waiver.

THE COURT: Um, well, the case, uh, that you cite to, uh, on this point is a case where, um, I think it's Bostanopor [phonetic]—

MS. TANISHA MASSIE: [Interposing] Yes.

THE COURT: —where, um, the BIA mentioned nothing, right? Um, here, uh, I think both the IJ and the BIA were aware of the fact that this woman had five children, the oldest being 13 or 14, a dependent mother, had not been in Guyana for

many years. They were aware of that. That's what we look to. So if you're telling us we have discretion to compu—, compare severe hardship to extreme hardship, I—I—I think that we're in an area that is purely discretionary.

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MS. TANISHA MASSIE: Your Honor, I think, um, uh, the—your bringing up Bostanopor in Seventh Circuit I think is instructive here, because there, Judge Posner cautioned against, uh, the Court trying to fill the gap that was left by the immigration judge. In that case the, uh, the immigration judge denied, uh, asylum for the same reasons—on the same discretionary grounds that he had—he was to deny Section 212(c) relief.

THE COURT: But that's a different standard, and there they said the Board gave no reasons for its discretionary determination. We don't say—you don't say that here, do you?

MS. TANISHA MASSIE: I wouldn't say that they—I didn't think they're—that a re–, that the—a reexamination of the reasons needs to occur. I'm not saying, um, that there were no reasons given, Your Honor. However, if, uh,—Bostanopor, where the Court said you cannot simply take the factors that you use for any other form of relief and apply them in denying, uh, the, uh, another form of relief on discretionary grounds, that that was inappropriate. And that's the same thing that happened here. Cancellation of removal, the factors are different under cancellation of removal than

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they are under 212(h). There's no requirement under cancellation of removal to look at hardship. However, when we look at the statutory grounds for granting 212(h) relief, there is a requirement of a finding of extreme hardship, and frankly we just don't know how it would have changed if the judge had waived the determination and gone through the analysis of whether or not there was extreme hardship.

THE COURT: Thank you. You've reserved two minutes for rebuttal. We'll hear—

MS. TANISHA MASSIE: [Interposing] Yes, Your Honor.

THE COURT: —from the government.

MS. SARAH MALONE: Will it please the Court, Sarah Malone for the respondent. Ms. Henry's failed to raise a—a question of law or a constitutional claim with regard to the agency's dispositive, uh, discretionary denials of relief from removal. Uh, instead she mischaracterizes the agency's decision, she identifies an, uh, legal standards, and she intends to dispute the agency's weighing of the evidence. Um, it—none of these—none of those issues are reviewable. Uh, the agency here, in accordance with its—of decisions, properly balanced the evidence of positive and adverse

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factors in determining that Ms. Henry didn't prove, uh, that a favorable exercise of discretion on her avocations for relief from removal, uh, would be in the best interests of this country. Um, in the context of the, uh, the extreme hardship discussion,

uh, that the Court just had, the—the immigration judge did in fact, uh, identify the—the—the correct rule of law under, uh,—Morales and Cervantes, and weighing all of the relevant factors as to hardship, all of the evidence that went to—to—to a showing of hardship, and the Board independently reviewed, uh, the extreme hardship argument that Ms. Henry raises to this Court, and determined that any hardship Ms., uh, Henry showed was not outweighed by the adverse factors in her case.

THE COURT: Counsel, what do you take to mean the fact that in 212(h), um, extreme hardship is picked out and, um, noted separately? Does that require a different analysis?

MS. SARAH MALONE: There, uh, it—it—it is a statutory element for 212(h), uh, uh, and the, uh, matter of Cervantes is the Board's decision that—that identifies which factors go into determining, uh, extreme hardship, um, and the immigration judge in this case identified those factors, um, and then

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he also, in weighing of this evidence, went through—went through them on page 167 of the, uh, joint appendix. Um, so ul–, ultimately here, uh, uh, what Ms. Henry's trying to do is to rehash—use of discretion argument, um, as a constitutional claim or, uh, a question of law, and, uh, it is neither and, uh, this Court, uh, it—it's unreviewable per—per her claim.

THE COURT: So you can't even get to 212(h) without having extreme hardship, but if you have it, that doesn't guarantee—

MS. SARAH MALONE: [Interposing] Precisely.

THE COURT: —a favorable exercise of discretion.

MS. SARAH MALONE: Yes, the—

THE COURT: [Interposing] Is that your argument?

MS. SARAH MALONE: Well, in fact that's what the Board says in Mendes Morales, that even—even, uh, upon showing of extreme hardship, uh, the—the alien must still show that, uh, a favorable exercise of administrative grace here, uh, is in the best interest of this country.

THE COURT: So—so you need it to even get the 212(h) consideration that is—that's what you have

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to prove. But having proved that, that's not the end of the issue.

MS. SARAH MALONE: No, it isn't. There's a separate, uh, and distinct discretionary, uh, component, and, uh, as—as the Board described, a matter of, uh, Mendes Morales and, uh, the—those, uh, discretionary factors are—are identified in the matter of—for instance, and the matter of Cervantes. And if the agency would prove that that whole, uh, weighing of the favorable, uh, evidence and the adverse evidence, uh, in order to—in—in de–, in—in exercising this discretion here.

THE COURT: Deal with, um, the petitioner's argument that, um, the—the different tests for cancellation and removal were conflated and said I'm applying my previous analysis and and and again finding against the petitioner.

MS. SARAH MALONE: Well, in fact the same factors that were used for the matter of Marin, uh, analysis—originated under the 212(c) waiver, uh,

has been incorporated in Board case law to apply those to, uh, 212(h) waivers and 240(a), uh, cancellation of removal, which both are which at issue here.

THE COURT: So they're comparable, but they

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don't have identical statutory language.

MS. SARAH MALONE: No, the statute of language is different, yes.

THE COURT: Um, so if the statutory language is different, haven't they given rise over time to different analysis?

MS. SARAH MALONE: Yeah, there's a—the—the—both of the statutes state that—that—that the alien must meet certain, uh, statutory criteria, and then the agency may, uh, may consider, um, to grant—whether to grant the, uh, the—the waiver, cancellation of removal, in its exercises of discretion, and the agency has determined the factors that it will consider, uh, uh, when—when exercising its discretion.

THE COURT: So though it has different statutory language, it still comes down to discretion reposed in the agency, and if it's discretion, we are without jurisdiction to review how the agency exercised that discretion. We are not, however without jurisdiction if the agency used the wrong standard or imported improperly one analysis from one statute to another statute. I believe that's the argument that the petitioner makes.

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MS. SARAH MALONE: She—she is attempting to—to make a, uh, a legal, uh, and—and erroneous

legal stand of arguing. She claims it's a question of law. Here, however, the agency didn't—did not apply the erroneous—an erroneous legal standard. Uh, the immigration judge, uh, considered all the evidence of hardship, and weighed it against the adverse factors. The petitioner, uh, here raised this issue to the Board of Immigration Appeals, which independently re–, reviewed the record and the evidence, then—the immigration judge's finding, and proceed to supplement the decision by saying any hardship—any hardship this petitioner has shown does not outweigh the—the—the cumulative adverse factors in, uh, in—in this record.

THE COURT: Is any hardship enough to meet the extreme hardship, uh, statutory language—

MS. SARAH MALONE: Well, here—

THE COURT: —by saying any hardship—

MS. SARAH MALONE: —here the agency found that—that all of the—all of the—all of the, uh, the evidence of p–, of, uh, of hardship, uh, the—emotional hardship, the financial hardship, um, uh, uh—

THE COURT: [Interposing] The children.

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MS. SARAH MALONE: To the children, yes. Yes. Um, uh, did not outweigh the negative factors, and that is precisely within the agency's discretion to determine, and, uh, she hasn't shown that—that—that her claim that the agency didn't formally use the term extreme hardship in this case rises to the level of the constitutional claim of—law.

MALE VOICE 1: So is your—is your point that by using the phrase any hardship, the, uh, the Board

was saying, whatever hardship, no matter how extreme—

MS. SARAH MALONE: [Interposing] Yes, it—

MALE VOICE 1: —would not be sufficient?

MS. SARAH MALONE: Yes. Um, I—I—I just also want to point that she—she—she quibbles or—or complains that the agency—pending charges, um, when—um, proves this Court in Wallace, uh, stated that the agency's factors in the matter of Marin, uh, that the agency can look to the presence of other evidence indicative of an alien's character, and their desirability as a permanent resident in—in this country, that upheld it, and—and Wallace said that the agency may consider charges leading to a conviction, or no legal judgment whatsoever when determine—when exercising its discretion. Um, and

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as to her claims that the agency relied us, uh, Ms. Henry's failure to—to acknowledge her culpability as to the pending charges, the agency didn't. The, uh, the record makes clear that the agency relied on her lack of candor and failure to acknowledge her guilt as to, uh, her criminal conduct for which she was convicted in the past, and under the matter of—and even the Ninth Circuit case she cites to, uh, Nguyen [phonetic], the age–, it is—that it is permissible for the agency to consider that. Um, because—because the—the agency's dispositive decision had—has gone unchallenged in this Court, um, there is no need to reach the—challenge. Um, in the event the Court finds for some reason the agency made an error in—deter-

minations, uh, the, uh, the alien's, uh, statutory rights—for 212(h) should be remanded also to the Board for the Board to decide in the first instance, under Ventura, um, because—because it didn't decide it in this case. Um, unless there are any further questions.

THE COURT: Thank you, counsel. Ms. Massie, you reserve two minutes for rebuttal.

MS. TANISHA MASSIE: Thank you, Your Honor. All immigration—almost—nearly ever single form of relief under immigration law has a discretionary

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component. But that doesn't mean that you can simply substitute one, uh, uh, an analysis for one form of relief for an analysis for the other, and that's what happened here. The immigration judge simply decided that he would not analyze the 212(h) factors. Uh, he found Ms. Henry was ineligible, and simply decided that he was not going to undergo the analysis that—under the statute.

THE COURT: Aren't they essentially the same? Aren't they—don't they come down, finally, to the exercise of discretion in balancing the positive and adverse factors?

MS. TANISHA MASSIE: Your Honor, ultimately it is a balancing test. However, there is a balancing t–, balancing test, for example, that happened in—that happens, uh, in a—case, for the Bostanopor case, um, for example. The—in a—deciding whether or not to grant asylum the Court balances any adverse factors, um, versus, uh, a person's fear of persecution. Um, here, uh, that's the—it—it's, uh, equivalent in the 212(h) determination. If you

are eligible for 212(h), then by definition there is extreme hardship, and then the balancing begins. It can be m–, uh, one of several factors that are used, but it's cr–, there's a critical difference here.

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There's a—there's a critical difference. Uh, the language is in the statute, the extreme hardship requirement is in the statute. Um, it is not in the cancellation, it is not a requirement of cancellation, and frankly I just don't—we just don't know what the immigration judge would have done if he had undertaken the analysis for extreme hardship. Uh—

THE COURT: [Interposing] But he does tell. Um, aren't you heard in this case, in the opinion, the—the immigration judge does cite the legal standard, so we know, a couple of pages before he makes his ultimate finding, that he is ex–, he is aware that extreme hardship is the standard for the waiver, and your argument, skillfully made, uh, ends up being particular words must be said at the end of the—at the end of the opinion, or there's a fundamental flaw, even if the entire analysis appears correct, and we've shied away from saying, uh, ritualistic words must be, uh, used as immigration judges pronounce decisions.

MS. TANISHA MASSIE: Uh, I would just like to say, Your Honor,—that we do not believe that it is ritualistic or that it—there is a semantic difference. There is a real difference in

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immigration law between extreme hardship, ex–, exceptional and extremely unusual, uh, hardship,

and, uh, because the immigration judge did not undergo the proper analysis, Ms. Henry suffered equal protection, uh, violations and due process violations, and, um, we ask that her case be ran–, remanded for this reason, and also for, um, the reasons that we stated in our papers about the errors of law that occurred under her cancellation of removal application. Thank you.

THE COURT: Thank you, counsel. Thank you both. Um, the last case is on submission, so I'll ask the clerk to adjourn Court.

THE CLERK: The Court stands adjourned.

[END TAPE 1 SIDE A]

CERTIFICATE

I, Victoria Bickford, certify that the foregoing transcript is a true record of said proceedings, that I am not connected by blood or marriage with any of the parties herein nor interested directly or indirectly in the matter in controversy, nor am I in the employ of the counsel.

Signature Victoria L. Bickford

Date March 26, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

07-1884-AG

JENNY LEE HENRY, a.k.a. Karen Allen,
a.k.a. Karen Henry, a.k.a. Annette Williams,
a.k.a. Andrea Scantlebury,
a.k.a. Williams Sherlly,
a.k.a. Jennylee Henry, a.k.a. Lorna Williams,
a.k.a. Sharon Smith, a.k.a. Jennymary Henry,
Shelly Williams, a.k.a. Williams,

Petitioner-Appellant,

v.

ALBERTO R. GONZALES,
Attorney General of The United States,

Respondent-Appellee.

ON APPEAL FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF PETITIONER-APPELLANT
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PRELIMINARY STATEMENT

Petitioner Jenny Lee Henry respectfully seeks reversal of the April 26, 2007 order of the Board of Immigration Appeals (the "BIA") dismissing Ms. Henry's appeal of the Immigration Judge's ("IJ") denial of Ms. Henry's applications for cancellation of removal under Section 240A of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1229b ("Section 240A"), and a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h).

Ms. Henry is 39 years old and has lived in the United States since she entered as a lawful permanent resident ("LPR") in 1984. She is a citizen of Guyana. Ms. Henry is the mother of five U.S. citizen children, all of whom are minors. Since her entry to the United States, Ms. Henry has never returned to her native country or otherwise left the United States. Besides an aunt with whom Ms. Henry has sporadic contact, Ms. Henry has no ties to Guyana. On June 12, 2000, Ms. Henry was served with a Notice to Appear, charging her with deportability pursuant to INA § 237(a)(2)(A), as an admitted alien convicted of two or more crimes involving moral turpitude not arising out of a single scheme of misconduct. On remand from the United States Court for the Southern District of New York, Ms. Henry—who had conceded removability—applied for cancellation of removal under INA § 240A. Ms. Henry also applied for waiver of inadmissibility under INA § 212(h) on grounds of extreme hardship to her family. In a Decision and

Order dated December 9, 2005 ("IJ Dec."), the IJ denied both of Ms. Henry's applications.

With respect to Ms. Henry's cancellation of removal application the IJ—contrary to controlling law and Ms. Henry's Fifth Amendment right to due process—improperly considered the existence of certain arrests and unproven charges that were still pending when the IJ ordered Ms. Henry's proceedings closed to further evidence. The IJ also committed legal error by improperly considering the fact that Ms. Henry insisted that she was innocent of certain conduct for which she was arrested and/or convicted.

With respect to Ms. Henry's application for a Section 212(h) waiver, the IJ ruled that as an LPR in removal proceedings, Ms. Henry was ineligible for Section 212(h) relief without a concurrent application for adjustment of status. Had Ms. Henry been in exclusion proceedings or had she left the country and returned subsequent to a conviction upon which her removability was based, Ms. Henry would have been able to apply directly for Section 212(h) relief without a concurrent application for adjustment of status. There is no rational basis for requiring Ms. Henry to make further applications solely because she has never left the country. The IJ further ruled that even if Ms. Henry were eligible for Section 212(h) relief, he would deny her application based on his determination in Ms. Henry's separate application for cancellation of removal. Those grounds were flawed as a matter of law. Moreover, before moving on to those grounds, the IJ failed to make formal finding as to the extreme

hardship Ms. Henry's children would face if Ms. Henry were removed, thereby effectively ignoring a relevant factor.

Ms. Henry administratively appealed the IJ's decision. With the exception of Ms. Henry's constitutional arguments concerning her direct eligibility for Section 212(h) relief, which it did not reach, the BIA affirmed the IJ's rulings and dismissed Ms. Henry's appeal. Ms. Henry now seeks reversal of the BIA's order dismissing her appeal.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a final order of deportation pursuant to 8 U.S.C. § 1252(a)(1). Furthermore, under 8 U.S.C. § 1252(a)(2)(D), Ms. Henry is entitled to a "review of constitutional claims or questions of law raised upon [her] petition for review." 8 U.S.C. § 1252(a)(2)(D). This Court has recently held that for purposes of jurisdiction under 8 U.S.C. § 1252(a)(2)(D), a "question of law" includes a claim that the BIA "applied an erroneous legal standard in making a discretionary determination," as well as claim that "the IJ based his decision on an unambiguous misstatement of pertinent facts in the record." *Khan v. Gonzales*, ___ F.3d ___, Docket No-4905-AG, 2007 WL 2127712, at *3 (BIA July 26, 2007).

Ms. Henry timely filed her petition for review on May 3, 2007. Venue is proper because the administrative proccedings were completed in this Circuit. 8 U.S.C. § 1252(b)(2); JA at 000151 (IJ Dec.). Ms. Henry has exhausted the administrative reme-

dies available to her as of right, and the validity of the BIA's order of deportation has not been considered in any prior judicial proceeding. 8 U.S.C. § 1252(d).

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 32, Ms. Henry respectfully requests oral argument. The issues presented for review raise significant constitutional and statutory interpretation questions. Because of the importance and complexity of the issues presented, Ms. Henry respectfully submits that oral argument would help explicate the arguments for the Court.

ISSUES PRESENTED

1. Whether the BIA erred as a matter of law, and violated Ms. Henry's right to equal protection under the Fifth Amendment to the U.S. Constitution, by leaving intact the IJ's holding that Ms. Henry is ineligible for relief under INA § 212(h) (8 U.S.C. § 1182(h)).

2. Whether the BIA erred as a matter of law, and violated Ms. Henry's procedural due process rights under the Fifth Amendment to the U.S. Constitution, in affirming the IJ's denial of cancellation of removal under INA § 240A(a) (8 U.S.C. § 1229b(a)) where the IJ relied on certain impermissible adverse factors to negate a finding of rehabilitation and minimize Ms. Henry's showing of hardship.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Jenny Lee Henry emigrated from Guyana in 1984 and was admitted into the United States as a lawful permanent resident ("LPR"). JA at 001221 (Application for Cancellation of Removal); JA at 000281 (Tr. at 103). Since Ms. Henry moved to the U.S. twenty-two years ago, she has never been back to Guyana. JA at 000270 (Tr. at 92). Except for one aunt who remains in Guyana, with whom Ms. Henry speaks only sporadically, Ms. Henry no longer has any ties to that country. JA at 000266-268 (Tr. at 88-90). All of her immediate family, including her parents and siblings, are either LPRs or U.S. citizens and are currently living in the U.S. JA at 000259-261 (Tr. at 81-83). In particular, Ms. Henry's mother is a naturalized citizen. JA at 000259 (Tr. at 81). Ms. Henry's father was admitted to the United States as an LPR on August 28, 2005. JA at 000865 (Copy of Passport Pages of Clarence Arthur Boston).

Ms. Henry is the mother and was the sole caretaker of five minor daughters, all of whom are U.S. citizens: Shanequia Shantha Henry (16 years old), Oneika Shamari Henry, (15 years old), Tameika Aneisha Henry (11 years old), Alizah Zaneshia Henry, (9 years old) and Asha Vanesha Henry, (8 years old). JA at 000285 (Tr. at 107 (noting that Ms. Henry is [the] only adult in [the] household)); JA 001221 (Application for Cancellation of Removal); JA at 00103-1107 (Birth Certificates for Ms. Henry's Children). Ms. Henry's children are all

minors and have lived their entire lives in the U.S. JA at 000301 (Tr. at 123). None of Ms. Henry's children has ever traveled to Guyana. *Id.*

As a result of the undue influence of certain acquaintances, the poverty Ms. Henry faced in the United States and poor judgment, Ms. Henry engaged in some shoplifting incidents in an effort to make ends meet. JA at 000307 (Tr. at 129); JA at 000316 (Tr. at 138 (discussing acquaintances). Ms. Henry's problem with shoplifting led to a number of convictions, none of which rendered her ineligible for relief from removal. See JA at 1169 (List of Arrests and Convictions filed with Application for Cancellation of Removal); JA at 1229 (Arrest Report).

On May 24, 2000 the INS issued a Warrant for Arrest of Alien (Form I-200) for Ms. Henry. JA at 001446-1447 (Warrant for Arrest). On June 12, 2000, Ms. Henry was served with a Notice to Appear while in custody, charging her with deportability pursuant to INA § Section 237(a)(2)(A)(ii), as an admitted alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. JA at 001443-1444 (Notice to Appear). The Notice to Appear cited two convictions for petit larceny stemming from Ms. Henry's shoplifting, which were entered on January 10, 2000 and March 14, 2000. *Id.* An additional conviction for petit larceny, also for shoplifting, dated October 5, 1987 was subsequently added as a basis for deportability. JA at 001448 (Form I-261). Beginning June 13, 2000, Ms. Henry was detained

in the Avoyelles Women's Correctional Facility in Cottonport, Louisiana. JA at 000152 (IJ Dec. at 2).

On June 13, 2000, Ms. Henry appeared before the Immigration Court in Oakdale, Louisiana where she conceded removability and submitted an application for cancellation of removal. *Id.* The Oakdale Court denied her application for cancellation of removal on December 12, 2000, on the basis that her application was time-barred, and ordered Ms. Henry removed to Guyana. *Id.*

Ms. Henry appealed that decision to the BIA. *Id.* On March 23, 2001, the BIA affirmed, without opinion, the decision of the Oakdale IJ. *Id.* Ms. Henry, through counsel, submitted a motion to reconsider, arguing that the "stop-time" rule in INA § 240(A)(a), enacted in 1996, could not be applied to Ms. Henry's 1987 conviction without violating the *ex post facto* clause of Art. I of the U.S. Constitution. *Id.* On May 15, 2001, the BIA denied Ms. Henry's motion to reconsider. JA at 000153 (IJ Dec. at 3).

Ms. Henry thereafter sought of writ of habeas corpus pursuant to 28 U.S.C. § 2241 before the United States District Court for the Southern District of New York, seeking an order (i) vacating her order of removal and (ii) declaring her eligible to apply for cancellation of removal pursuant to INA § 240(A)(a) and a waiver of inadmissibility under INA § 212(h). *Id.* While her petition was pending, Ms. Henry was granted supervised release in June 2001 and she returned to New York City. JA at 000152 (IJ Dec. at 2). On November 30, 2001, the S.D.N.Y. granted Ms. Henry's petition, holding that the provisions of

INA § 240(A)(a) enacted in 1996 which limit an applicant's ability to seek relief from an order of removal could not be applied retroactively. JA at 000153 (IJ Dec. at 3). The S.D.N.Y. remanded the case to the BIA and directed the INS to permit Ms. Henry to file applications for cancellation of removal pursuant to INA § 240(A)(a) and a waiver of inadmissibility pursuant to INA § 212(h). *Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001); JA at 000153 (IJ Dec. at 3).

In a per curiam order dated June 10, 2002, the BIA vacated its decisions from March 23, 2001 and May 15, 2001. JA at 000153 (IJ Dec. at 3). The BIA remanded the case to the Immigration Court for further proceedings consistent with the S.D.N.Y.'s decision and order. *Id.* After Ms. Henry was granted a Motion to Change Venue on August 13, 2002, hearings at the Immigration Court of New York, New York commenced on January 29, 2003 before Immigration Judge Alan P. Page. *Id.*

At the remanded proceedings, Ms. Henry presented evidence that she was effectively the sole financial supporter for her five children and was deeply involved in their care and welfare. JA at 000295-298 (Tr. at 117-120); JA at 000952-956 (Letter of Support from Henry Children); JA at 000957 (Letter of Support from Lucille Charles). The father of Ms. Henry's three youngest children was serving a prison sentence following a drug conviction and had provided any support to Ms. Henry and her children since he was arrested in March 2003. JA at 000409-410 (Tr. at 231-232). The father of Ms. Henry's two oldest children had provided only limited support of $150

every two weeks since June 2001. JA at 000411-413 (Tr. at 233-235).

Ms. Henry also presented evidence that her care and continued presence was instrumental to the health of her children. JA at 000564 (Tr. at 385) (testimony of Denise Adler noting that while Ms. Henry was in INS custody her daughters had health problems, including contracting ringworm and that such problems have not occurred since Ms. Henry has been released from custody). This is critical for Ms. Henry's second-oldest daughter, Oneika, who has suffered from eczema since birth and receives Supplemental Social Security Income to pay for treatment of her condition. JA at 000252, 000257 (Tr. at 74, 79); JA 001144-1146 (Proof of Bank Account for Oneika Henry). Ms. Henry further made a showing of extreme hardship to her family—particularly her U.S. citizen children—if she were removed. Indeed, while the IJ did not make a formal finding of whether Ms. Henry met the extreme hardship standard under Section 212(h), the IJ held that Ms. Henry's removal would lead to "severe emotional and economical hardship" for her children. JA at 000167 (IJ Dec. at 17). Specifically, the IJ recognized that it was unlikely that Oneika would receive the same level of medical treatment in Guyana and further recognized that the opportunities for all of Ms. Henry's daughters would be far more limited than opportunities in the United States. *Id.*; *see also*, JA 000283 at (Tr. at 105); JA at 000566 (Tr. at 387). Moreover, during the administrative proceedings, both the IJ and the Government admitted that if Ms. Henry's daughters remained in the United

States, the likely outcome would be that they would be separated in foster care. JA 000483 (Tr. at 305).

Ms. Henry also established strong evidence of rehabilitation. Ms. Henry had made efforts to stay away from the former acquaintances that introduced her to shoplifting and had focused on her relationship with her children. JA at 000350 (Tr. at 172); JA at 000559 (Testimony of Denise Adler (Tr. at 380)). Ms. Henry began attending Church on a weekly basis. JA at 000548 (Tr. at 369). In addition, Ms. Henry tackled her problems with shoplifting head-on and participated in a rehabilitation program for shoplifters, Shoplifters Alternative, which she successfully completed. JA at 000352 (Tr.at 174); JA at 000922 (Letter from Shoplifters Alternative dated January 30, 2004 ("Shoplifters Alternative Letter")). Upon completion of the program, Shoplifters Alternative determined that, based on Ms. Henry's responses to certain questions posed during the program, it appeared that Ms. Henry's shoplifting behavior was "less related to criminal intent and more the result of personal stress or other factors affecting [her] life." JA at 000922 (Shoplifters Alternative Letter). In conjunction with participating in rehabilitation program, the record demonstrated that Ms. Henry had made a concerted effort to set her life in order. JA at 000366-367, 000369 (Tr. at 188-89, 191) (discussing efforts to deal with low income without resorting to shoplifting). Ms. Henry's mother also confirmed that Ms. Henry's efforts to "improve her life and those who she deals with on a daily basis have grown beyond expectation." JA at 000957 (Letter of Support from Lucille Charles).

On December 9, 2005, the IJ denied Ms. Henry's application for cancellation of removal under INA § 240(A)(a) and Ms. Henry's application for a waiver of inadmissibility under INA § 212(h), and ordered Ms. Henry removed to Guyana. JA at 000171 (IJ Dec. at 21). In denying Ms. Henry's application for cancellation of removal, the IJ effectively based his rulings on two constitutionally improper adverse findings. First, the IJ found that Ms. Henry's insistence that she was innocent of certain conduct for which she was arrested and/or convicted evinced a lack of remorse and rehabilitation. During the proceedings, Ms. Henry explained that certain of her shoplifting convictions were cases of mistaken identity or occurred when she was at the wrong place at the wrong time. JA at 000305 (Tr. at 127). Ms. Henry also explained that she felt pressured to take certain pleas even though she believed she was innocent. JA at 000306, 000308-311 (Tr. at 128, 130-133). Notwithstanding these specific claims of innocence, Ms. Henry freely admitted that she committed the majority of her offenses and that "[she knew she] was doing something wrong." JA at 000365 (Tr. at 187); JA at 000305-318, 000407-408, 000431, 000434-437, 000439-445, 000454, 000467 (Tr. at 127-40, 229-30, 253, 256-59, 261-67, 276, 289).

The IJ also improperly relied on the existence of certain arrests and charges that remained pending and undetermined when he ordered the record closed in Ms. Henry's proceedings. In expectation that these pending charges would ultimately be dismissed, or successfully defended, Ms. Henry's

counsel requested that the IJ extend the date on which proceedings would be closed. JA at 000649 (Tr. at 468). The IJ responded by providing only one additional week and expressly noted that it was unlikely that dispositions for the pending charges would be available at that time. JA at 000629 (Tr. at 448, 468-69). Ms. Henry's counsel responded by urging the IJ to refrain from relying on the pending charges as negative factors in his determination. JA at 168 (IJ Dec. at 18). Notwithstanding this request, the IJ improperly relied upon the pending unproven charges as a basis for making various adverse determinations including: (1) that because of the pending charges it was "hard to conclude, with any certainty, that even if Ms. Henry were to remain in the United States, she would remain with her children" (JA at 000143 (IJ Dec. at 17)); and (2) as adverse factors indicating lack of rehabilitation. JA at 000144 (IJ Dec. at 18).

The IJ also denied Ms. Henry's application for a waiver of inadmissibility under INA § 212(h), finding that Ms. Henry was ineligible for such relief, because as an LPR in deportation proceedings (as opposed to exclusion proceedings), she was required to submit a concurrent application for adjustment of status pursuant to 8 C.F.R. § 1245.1(f). Alternatively, the IJ found that even if Ms. Henry were eligible for Section 212(h) relief, he would deny the application on the same grounds as his denial of Ms. Henry's application for cancellation of removal. JA at 000146 (IJ Dec. at 20).

On January 6, 2006, Ms. Henry timely filed a Notice of Appeal with the BIA. JA at 000114-119

(Notice of BIA Appeal). The BIA dismissed Ms. Henry's appeal of the IJ's decision on January 19, 2007. JA at 000004 (Reissued Decision of the BIA, dated Apr. 26, 2007 at 2). The BIA's decision, however, was not timely sent to Ms. Henry's counsel due to an administrative error by the BIA. On March 27, 2007, Ms. Henry moved the BIA to rescind and reissue its decision dated January 19, 2007. On April 26, 2007, the BIA granted Ms. Henry's motion and re-issued its decision dated January 19, 2007, ordering that if be treated as if entered on April 26, 2007. JA at 000001-7 (Reissued Decision of the BIA, dated Apr. 26, 2007 at 2).

On May 3, 2007, Ms. Henry timely filed a Petition for Review of the BIA's April 26, 2007 decision.

SUMMARY OF ARGUMENT

The BIA erred as a matter of law in affirming the IJ's denial of Ms. Henry's application for waiver of inadmissibility under INA § 212(h). Ms. Henry is eligible to directly apply for Section 212(h) relief without a concurrent application for adjustment of status. There is no rational basis why Ms. Henry as an LPR who happened never to have traveled outside of the United States must concurrently apply for adjustment of status, when a similarly situated LPR who had sojourned would be able to directly apply for the waiver. To make Ms. Henry's eligibility for a waiver of inadmissibility turn on a factor as arbitrary as whether she traveled abroad is a violation of Ms. Henry's rights to equal protection under the Fifth Amendment. The BIA further erred

in affirming the IJ's ruling that even if Ms. Henry had been found eligible for Section 212(h) relief, the IJ would have denied such relief on the same grounds upon which he denied Ms. Henry's application for cancellation of removal. The IJ and BIA should have made a formal finding concerning the extreme hardship prerequisite of Section 212(h) before conducting an analysis of whether to grant discretionary relief. By failing to make such a finding, the IJ and BIA effectively ignored a relevant factor in rendering their determination, in contravention to the language of the statute and the BIA's own legal standards.

In addition, the grounds upon which the IJ denied Ms. Henry's application for cancellation of removal were also flawed as a matter of law. The BIA erred in affirming the IJ's denial of Ms. Henry's application for cancellation of removal under INA § 240A, where the IJ improperly considered certain factors, in violation of Ms. Henry's right to due process under the Fifth Amendment. Specifically, the BIA improperly considered the existence of certain arrests and charges against Ms. Henry that remained pending and undetermined after the IJ closed the record in Ms. Henry's proceedings. The IJ and the BIA also improperly relied on Ms. Henry's claims of innocence with respect to certain activities for which she was arrested and/or convicted.

STANDARD OF REVIEW

This Court exercises *de novo* review of the BIA's legal conclusions. *See, e.g., Qiu v. Ashcroft*, 329 F.3d 140, 149 (2d Cir. 2003); *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000). Under 8 U.S.C. § 1252(a)(2)(D), Ms. Henry is entitled to a "review of constitutional claims or questions of law raised upon [her] petition for review." 8 U.S.C. § 1252(a)(2)(D).

ARGUMENT

I. THE BIA ERRED IN DENYING MS. HENRY'S APPLICATION FOR WAIVER OF INADMISSIBILITY PURSUANT TO INA § 212(h)

The BIA improperly affirmed the IJ's denial of Ms. Henry's application for waiver of removal pursuant to INA § 212(h). The BIA failed to reach the threshold issue of whether Ms. Henry is eligible for Section 212(h) relief. The IJ held that Ms. Henry was eligible to apply for Section 212(h) relief without a concurrent application for adjustment of status. JA 000170 (IJ Dec. at 20). As Section 212(h) is currently applied, had Ms. Henry left the United States after the convictions that made her removable and later sought readmission, she would be eligible for Section 212(h) relief without a concurrent application for adjustment of status. *See In re Abosi*, 24 I. & N. Dec. 204, 205 (BIA 2007) (holding that a returning LPR seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with a Section

212(h) waiver). As this Court held in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) and reaffirmed recently in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 1007), a distinction premised solely on whether an alien has departed and returned to the country has no rational basis for equal protection purposes. *Francis*, 532 F.2d at 272.

Furthermore, the BIA improperly affirmed the IJ's alternative denial of Ms. Henry's application for Section 212(h) relief on the same grounds as the IJ's denial of Ms. Henry's application for cancellation of removal. The IJ and BIA, as a matter of due process, should have made a formal finding regarding Ms. Henry's showing of extreme hardship where this showing could have affected an independent discretionary analysis under Section 212(h). Moreover, the grounds upon which the IJ relied in denying Ms. Henry's application for cancellation of removal were erroneous as a matter of law and thus are an improper basis upon which to base the denial of Ms. Henry's application for Section 212(h) relief.

A. The BIA Improperly Denied Ms. Henry's Equal Protection Right to Direct Eligibility for Section 212(h) Relief

It is axiomatic that the constitutional guarantee of equal protection under the law applies to aliens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Because of Congress' plenary power over immigration issues, *see Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 556 (2d Cir. 1975) (citing *Lem Moon v. United States*, 158 U.S. 538

(1895)), federal classifications of aliens are subject to a rational basis standard of review. *See Francis*, 532 F.2d at 272. Pursuant to such scrutiny, "distinctions between different classes of persons must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.*

Pursuant to Section 212(h), the Attorney General may, in his discretion, waive certain grounds of exclusion, including convictions for crimes of moral turpitude, if:

> In the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence . . . it is established to the satisfaction of the Attorney General that the alien's [exclusion] would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

INA § 212(h)(1)(B); 8 U.S.C. § 1182(h)(1)(B).

Although Section 212(h) specifies that its provisions are to be utilized in inadmissibility proceedings, the BIA has long applied Section 212(h) in deportation proceedings in two situations. Where a legal permanent resident in deportation proceedings departed and returned to the United States subsequent to her conviction for deportable offense, such immigrant may be granted a Section 212(h) waiver *nunc pro tunc* without the need for an

adjustment of status. *See In re Sanchez*, 17 I. & N. Dec. 218, 222-23 (BIA 1980). On the other hand, where a legal permanent resident who has never left the United States seeks a Section 212(h) waiver, such an immigrant must submit a concurrent application for adjustment of status. *See In re Parodi*, 17 I. & N. Dec. 608, 611-12 (BIA 1980); *In re Bernabella*, 13 I. & N. Dec. 42, 43-44 (BIA 1968).

The distinction created by the BIA's interpretation and application of Section 212(h) turns on a classification—whether an alien has traveled abroad—that this Court has long held to be without a rational or reasonable basis. *See Francis*, 532 F.2d at 273. In *Francis*, this Court examined INA § 212(c), a statute that, like Section 212(h) was intended to provide an opportunity for the Attorney General, in his discretion, to waive certain grounds of excludability for aliens seeking entry to the United States. *See Francis*, 532 F.2d at 272 (noting Congress' concern that "there be some degree of flexibility to permit worthy returning aliens to continue their relationships with family members in the United States despite a ground of exclusion"). As with Section 212(c), the INS had expanded the reach of Section 212(c) to deportable aliens, based on its realization "that these consideration[s] apply with equal force to an alien who has already reentered." *Id.* This Court held, that once the benefits of this statute were expanded, the government could not make eligibility for such benefits hinge on random factual distinctions such as whether the alien had traveled outside of the country. *Id.* at 273. ("Fundamental fairness dictates that permanent

resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner."). Recently, this Court reaffirmed the central constitutional principle embodied by *Francis*. *Blake*, 489 F.3d at 100 (holding that the BIA's "comparable grounds" for granting Section 212(c) relief to aliens in deportation proceedings failed to comport with *Francis*). In that case, the Court made it clear that it deemed itself "bound by *Francis*'s mandate to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Id.* at 104 (citation omitted).

Relying heavily on this Court's decision in *Francis*, the U.S. Court of Appeals for the Eleventh Circuit has held, in the context of Section 212(h) relief, that the BIA's distinction premised on an alien's decision to travel outside of the United States is a violation of the Fifth Amendment. *Yeung v. INS*, 76 F.3d 337, 339-41 (11th Cir. 1995). In that case, the petitioner, a[n] LPR charged with deportability based on convictions for crimes of moral turpitude, sought a Section 212(h) waiver of inadmissibility but did not file a concurrent application for adjustment of status. The petitioner could not demonstrate that he had left and returned to the United States subsequent to the convictions that made him deportable. Comparing the case at bar to *Sanchez*, where the BIA found a[n] LPR in deportation proceedings eligible for Section 212(h) relief based on a *nunc pro tunc* theory, the *Yeung* Court stated:

> To claim, as the INS does here, that [the petitioner] belongs to a different classification of persons simply by virtue of his failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary, and that is without a fair and substantial relation to the object of the legislation. . . . We find that [the petitioner] and Sanchez are similarly situated and deserving of similar treatment under the law. In particular, as deportable aliens they are equally deserving of waiver consideration by the Attorney General.

Yeung, 76 F.3d at 340 (citations and quotations omitted).

Ms. Henry stands in the same position as the petitioner in the Yeung case. Ms. Henry satisfies all of the criteria for consideration for a Section 212(h) waiver and her five U.S. citizen minor children will face extreme hardship if Ms. Henry is removed. Yet merely because she has never left the United States, Ms. Henry is deemed ineligible for Section 212(h) relief absent a concurrent application for adjustment of status.[1] Ms. Henry, as a

[1] Under the BIA's own rulings, it is questionable whether such an application for adjustment of status even makes sense or is necessary for a legal permanent residents such as Ms. Henry. An application for adjustment of status creates a legal fiction whereby deportable LPRs are "held to be in the same position as aliens presenting themselves at the border, seeking entry as LPRs. . . . Such aliens are therefore both subject to the exclusion provisions of Section 212(a) and eligible for waivers of excludability." In re *Parodi*, 17 I. & N. Dec. at 611-12 (internal citations omitted). However, the BIA

deportable LPR should be afforded similar treatment as similarly situated LPRs who had the opportunity to leave the country. As this Court has made clear, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that [s]he has never departed since [her] initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *Francis*, 532 F.2d at 273.

B. The BIA Erred In Not Making A Formal Finding With Respect To The Extreme Hardship Faced By Ms. Henry's U.S. Citizen Children And Relying Solely On The IJ's Grounds For Denying Cancellation Of Removal

Because Ms. Henry is directly eligible for Section 212(h) relief, the IJ and the BIA should have made formal findings that Ms. Henry met the extreme hardship standard required under Section 212(h). Instead the IJ and the BIA failed to address the

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has ruled that a[n] LPR does not lose her status as such until a removal order against her becomes administratively final. *In re Lok*, 18 I. & N. Dec. at 101 (BIA 1991) *aff'd*, *Lok v. INS*, 681 F.2d 107 (2d Cir. 1981). Thus an alien who is a[n] LPR at the time deportation proceedings commence, such as Ms. Henry, does not have to adjust her status. On this reasoning, the BIA ruled that a returning LPR charged with inadmissibility did not need to make a concurrent application for adjustment of status to be eligible for Section 212(h) relief. See *In re Abosi*, 24 I. & N. Dec. at 206-07. There is no reason why the same rule should not apply to a[n] LPR such as Ms. Henry, who has never left the United States and is charged with deportability rather than inadmissibility. *Francis*, 532 F.2d at 272.

extreme hardship prerequisite. The IJ held that assuming *arguendo* that Ms. Henry were eligible for Section 212(h) relief and had met the statutory prerequisite, he would deny Ms. Henry's 212(h) petition on the same grounds that he denied Ms. Henry's petition for cancellation of removal. JA at 000170 (IJ Dec. at 20). The BIA affirmed this ruling. JA at 000007 (BIA Dec. at 5).

An IJ need not make express rulings concerning statutory eligibility, and may move directly to a discretionary denial in appropriate cases. *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976). However, the BIA itself has held that while a showing of extreme hardship does not create automatic entitlement to Section 212(h) relief "once established it is [a] favorable factor to be considered." *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (BIA 1996). By failing to make a formal finding as to extreme hardship the IJ—and subsequently the BIA—effectively ignored a factor that is not only relevant, but is also statutorily required for discretionary relief. This was in contravention to the BIA's own legal standard requiring an IJ to properly "specify the basis for any discretionary decision." *In re Marin*, 16 I & N Dec. 581, 586 (BIA 1978). Courts have affirmed that an agency (such as the BIA) must provide clear reasons for its decision as a matter of constitutional due process. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626-27 (1986) ("Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the

agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.").

Ms. Henry submitted strong evidence of extreme hardship. Ms. Henry is the sole legal custodian of her five U.S. citizen minor children. *See* JA at 000295-298 (Tr. at 117-120); JA at 000952-956 (Letter of Support from Henry Children)); JA at 000957 (Letter of Support from Lucille Charles). With minimal financial assistance from the children's fathers, Ms. Henry is effectively the children's sole financial supporter. JA at 000409-413 (Tr. at 231-35). Moreover, the record demonstrated that Ms. Henry's presence was vital to the continued health of her children, particularly Oneika, Ms. Henry's second oldest daughter, who suffers from eczema and receives SSI to pay for treatment of her condition. JA 000252, 000256, 000564 (Tr. at 74, 79, 385). Ms. Henry's removal consigns her U.S. citizen children to extreme hardship under any scenario. First, as the IJ recognized, if Ms. Henry's children depart with their mother to Guyana—a country none of them has ever visited before—their opportunities and livelihood would be far more limited than they are in the United States. JA at 000167 (IJ Dec. at 17); JA at 000283, 000566 (Tr. at 105, 387). Moreover, it would be unlikely that Oneika would receive the same level of medical treatment that is required for her condition. JA at 000167 (IJ Dec. at 17). Second, as the IJ also recognized, if Ms. Henry's children remained in the United States after Ms. Henry's removal, not only would they be separated from their mother, but

also the most likely outcome would be that they would be separated from each other in foster care. JA at 000483 (Tr. at 305). The Supreme Court has long recognized that the "right to live together as a family" is an important right deserving constitutional protection. *Moore v. City of East Cleveland*, 431 U.S. 494, 500-03 (1977) (noting that the Court's "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"). "Forcible separation of non-citizen legal resident of this country from his citizen child or spouse implicates this right of familial integrity." *Beharry v. Reno*, 183 F.Supp.2d 584, 588 (E.D.N.Y. 2002) *rev'd on other grounds Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

Both the IJ and BIA, as a matter of due process, should have made a formal finding as to the extreme hardship faced by Ms. Henry's children. In not doing so, neither the IJ nor the BIA appropriately made an independent discretionary determination in light of Ms. Henry's showing of extreme hardship. Rather they relied solely on the IJ's separate findings concerning Ms. Henry's application for cancellation of removal, which considered only a showing of hardship. This was improper as a matter of law. *See Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992). In *Bastanipour*, the BIA affirmed an IJ's denial of the petitioner's applications for asylum and, in the alternative, withholding of deportation pursuant to Section 212(c). *Id.* at 1130. Without a formal analysis, the BIA summarily

ruled that the petitioner made no showing of a well-founded fear of persecution and denied his application for asylum. *Id.* at 1130-31. Alternatively, the BIA ruled that even if the petitioner had a well-founded fear of persecution, the BIA would refuse asylum in the exercise of its discretion. *Id.* at 1131. The BIA gave no reasons for its discretionary determination with respect to asylum, but did provide reasons for its discretionary determination in denying the petitioner's 212(c) application. *Id.* Judge Posner, writing for the Court of Appeals for the Seventh Circuit, held that this was improper because "[i]n striking the balance against [the petitioner] the Board assumed the [that] he lacked well-founded fear of persecution. As it did not discuss how the balance might incline if he had such fear, its resolution of the Section 212(c) issue does not fill the gap left by its failure to discuss the issue of discretion under the asylum provision." *Id.*

Similarly, in this case, the BIA's and IJ's summary denial of Ms. Henry's 212(h) petition on the same grounds as its denial of cancellation of removal fails to "fill the gap" left by their failure to analyze and make findings with respect to Ms. Henry's showing of extreme hardship to her U.S. citizen children. Had there been a formal finding of extreme hardship to Ms. Henry's children, the balance of equities specific to Ms. Henry's 212(h) petition may have tipped in favor of Ms. Henry.

Moreover, BIA's affirmance of the IJ's decision to deny Ms. Henry's application for Section 212(h) relief based on the same grounds as the denial of her application for cancellation of removal was

improper because the IJ's grounds for denying Ms. Henry's cancellation of removal petition was erroneous as matter of law, as shown below in Part II.

II. THE IJ AND THE BIA ERRED AS A MATTER OF LAW AND VIOLATED MS. HENRY'S CONSTITUTIONAL DUE PROCESS RIGHTS IN DENYING HER APPLICATION FOR CANCELLATION OF REMOVAL BASED ON CONSTITUTIONALLY IMPROPER GROUNDS

Ms. Henry meets the statutory requirements set forth in INA § 240A(a) and was improperly denied cancellation of removal as a matter of law by the IJ and the BIA.

To be statutorily eligible for cancellation of removal under INA § 240A(a), an applicant must (i) be lawfully admitted for permanent residence for not less than 5 years, (ii) have resided in the United States continuously for 7 years after having been admitted in any status and (iii) not have been convicted of any aggravated felony. INA § 240A(a), 8 U.S.C. INA § 1229b(a). During the Immigration Court proceedings, it was undisputed that Ms. Henry satisfied these statutory eligibility requirements. JA at 001221 (Application for Cancellation of Removal). In addition, pursuant to BIA ruling concerning cancellation of removal, in exercising discretion under INA § 240A(a), "an Immigration Judge, upon review of the record as a whole, 'must balance the adverse factors evidencing the applicant's undesirability as a permanent resident with the social and humane considerations presented in

his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country.'" *In re C-V-T*, 22 I. & N. Dec. 7, 11 (BIA 1998) (quoting *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978)).

Although cancellation of removal under INA § 240A(a) involves a discretionary component, it should not be arbitrarily denied and it should not be based on considerations that violate due process. *See Khan v. Gonzales*, ___ F.3d ___, Docket No-4905-AG, 2007 WL 2127712, at *3 (BIA July 26, 2007). To protect applicants against this risk, federal court case law and BIA precedent provide binding guidelines that must be followed in the IJ's exercise of discretion. Here, the BIA disregarded applicable precedents and thus committed errors of law in affirming the IJ's reliance on Ms. Henry's pending unproven charges and insistence of innocence with respect to certain charges as adverse factors in the IJ's discretionary inquiry.

First, the BIA erred as a matter of law, and violated Ms. Henry's procedural due process rights under the Fifth Amendment, in affirming the IJ's denial of cancellation of removal where the IJ relied on the existence of recent arrests and unproven charges pending against Ms. Henry even though the IJ had closed proceedings. JA at 000152, 000168; 000005-6 (IJ Dec. at 2, 18; Reissued Decision of BIA, dated Apr. 26, 2007 at 3-4).

An LPR's right to due process of law under the Fifth Amendment is well established. *See Brown v. Ashcroft*, 360 F.3d 346, 350-51 (2d Cir. 2004). The core of this due process is having "a meaningful

opportunity to be heard. *Id.* at 530; *Cf. Blakely v. Washington*, 542 U.S. 296 (2004) (holding in the context of sentencing guidelines that, other than fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). This Court has consistently held that evidence submitted in removal proceedings is admissible only if it is "probative and its use is fundamentally fair." *Montero v. INS*, 124 F.3d 381, 385-86 (2d Cir. 1997); *see also Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 268 (2d Cir. 2006). Otherwise, as is the case here, reliance upon such evidence constitutes a violation of the LPR's procedural due process rights.

Ms. Henry testified that she was vigorously defending against the pending charges. JA at 000616-619; 000167 (Tr. at 436-439; I.J. at 18). The IJ's decision to close the record, and then use the existence of pending charges, with no evidence of conviction or corroborating evidence, denied Ms. Henry the opportunity to submit possibly favorable evidence with respect to some or all of these arrests. Instead, the IJ relied on these unproven allegations to effectively nullify two positive factors in favor of Ms. Henry's application—namely, the hardship Ms. Henry's family would suffer if she were deported and Ms. Henry's rehabilitation. JA at 000167-168 (IJ Dec. at 17-18).

These determinations dispositively impacted the IJ's balancing of factors in his decision to deny Ms. Henry's application for discretionary relief. JA at 000170 (IJ Dec. at 20). The IJ found that

because of the pending charges it was "hard to conclude, with any certainty, that even if Ms. Henry were to remain in the United States, she would remain with her children" (JA at 000167 (IJ Dec. at 17)) and found it "hard to give much credence to the Respondent's claims of rehabilitation." JA at 000168 (IJ Dec. at 18). The IJ and the BIA thus impermissibly inferred from these arrests that Ms. Henry was in fact guilty of the offenses for which she was arrested. *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 816 (9th Cir. 1994) (The BIA cannot find "the *mere fact* of arrest probative of whether Petitioner had engaged in underlying conduct.") The IJ's closure of the proceeding while charges were pending and subsequent use of those unproven charges as negative factors constitute a fundamental legal and procedural error that directly prejudiced Ms. Henry.

Moreover, even if the BIA were correct in holding that it was proper for the IJ to have considered the pending unproven charges (which Ms. Henry submits it was not), the IJ erred as a matter of law in relying on the pending charges to the extent that he did. The BIA itself has stated that it is "hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein." *In re Catalina Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995). The IJ's failure to give these pending charges minimal or no weight was therefore also in contravention of the BIA's own legal standards. Accordingly, the BIA's holding that the IJ was entitled to rely on the recent arrests and charges pend-

ing against Ms. Henry was a violation of Ms. Henry's due process rights.

The BIA also erred as a matter of law in finding that the IJ properly based his determination that Ms. Henry had failed to demonstrate rehabilitation on Ms. Henry's insistence that she was innocent of certain conduct for which she was arrested and/or convicted. JA at 000167; 000005 (IJ Dec. at 18; Reissued Decision of BIA, dated Apr. 26, 2007 at 3).

As a matter of law, courts have held that refusal to acknowledge guilt regarding convictions cannot alone negate a finding of rehabilitation. *See, e.g., Guillen-Garcia v. INS*, 999 F.2d 199, 204-205 (7th Cir. 1993). Thus, to the extent the IJ based its determination that Ms. Henry had failed to demonstrate rehabilitation solely on her claims that she was innocent of certain conduct for which she was arrested and/or convicted, the BIA erred as a matter of law in affirming the IJ's decision.

CONCLUSION

For the reasons stated above, Ms. Henry respectfully requests that the BIA's decision be reversed and that the case be remanded to the BIA with instructions to return the matter to the IJ for a new determination of Ms. Henry's applications for cancellation of removal under INA § 240A(a) (8 U.S.C. § 1229b(a)), and for a waiver of inadmissibility under INA § 212(h) (8 U.S.C. § 1182(h)).

Dated: New York, New York
August 16, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with Federal Rule of Appellate Procedure 32(a) because it contains 7,471 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman font.

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FOR THE SECOND CIRCUIT

07-1884-AG

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Petitioner-Appellant,

v.

PETER D. KEISLER,
Acting Attorney General of The United States,

Respondent-Appellee.

ON APPEAL FROM
THE BOARD OF IMMIGRATION APPEALS

REPLY BRIEF OF
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PRELIMINARY STATEMENT

Petitioner Jenny Lee Henry has brought before this Court meritorious constitutional and legal challenges to the denials of her applications for a waiver under INA Section 212(h) and for cancellation of removal. Yet, the Government attempts to characterize Ms. Henry's reviewable issues as mere challenges of discretionary determinations. This is simply not the case. In its efforts to fit a square peg into a round hole, the Government not only misconstrues and oversimplifies Ms. Henry's arguments, but also misapplies the governing legal standards by which Ms. Henry's case should be decided.

As an initial matter, contrary to the Government's assertion,[1] it is well established that as a[n] LPR, Ms. Henry is entitled to due process protections. Because the Constitution's protections extend to Ms. Henry, this Court has the power to review Ms. Henry's claims that her due process and equal protection rights were violated when the IJ improperly denied her application for a waiver INA Section 212(h) and that her due process rights were also violated when the IJ improperly considered recent arrests after the record closed as part of the IJ's analysis of her application for cancellation of removal. Likewise, this Court also has the authority to review the questions of law Ms. Henry has

[1] Unless otherwise indicated, capitalized terms are as defined in the Brief of Petitioner-Appellant Jenny Lee Henry, dated August 16, 2007 ("Pet'r Br."). The Brief for Respondent, dated October 17, 2007, is referred to herein as "Resp't Br."

presented. As shown in Ms. Henry's opening brief, the IJ and the BIA failed to properly apply the correct legal standards in deciding both of Ms. Henry's applications for relief. Tellingly, the Government does not refute any of Ms. Henry's arguments in substance.

At bottom, Ms. Henry has presented meritorious and reviewable claims, and Ms. Henry's petition should therefore be granted and her case should be remanded to the BIA.

ARGUMENT

I. THE COURT HAS JURISDICTION TO CONSIDER MS. HENRY'S CONSTITUTIONAL AND LEGAL CLAIMS

8 U.S.C. § 1252 confers jurisdiction on this Court to review "factual and discretionary decisions . . . under the INA . . . to the limited extent that the petition for review of such decisions raises a constitutional claim or a question of law." *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 324 (2d Cir. 2006); 8 U.S.C. § 1252(a)(2)(D). The Government nevertheless contends that this Court does not have jurisdiction to hear Ms. Henry's appeal because she is not entitled to due process with respect to her applications for relief and because she is merely challenging discretionary determinations. Lost in the Government's analysis, however, is the fact that Ms. Henry's claims present constitutional and legal questions arising from the denial of applications for a a waiver of inadmissibility under INA § 212(h) (8 U.S.C. § 1182(h)) and cancellation of

removal under INA § 240A(a) (8 U.S.C. § 1229b(a)), which are properly within the jurisdiction of this Court.

A. Ms. Henry Is Entitled To Review Of Her Due Process Claims

The Government contends that a[n] LPR who seeks discretionary relief in removal proceedings may not present a due process claim because she has no protected liberty or property interest. Resp't Br. at 14-18. This position is unsupportable in light of the numerous pronouncements of the Supreme Court (and this Court), which make clear that LPRs enjoy due process protections, including the right to a full and fair hearing that comports with applicable legal standards.[2]

As early as 1953, the Supreme Court noted that an immigrant in deportation proceedings is entitled to the protections of the due process clause. *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to tra-

2 The Government does not dispute, and thus impliedly concedes, that Ms. Henry is also guaranteed equal protection under the law. *Francis v. INS*, 532 F.2d 268, 272 (2d Cir.) ("It has long been held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens . . .") (citation omitted). Because Ms. Henry also contends that she was improperly treated differently than similarly situated LPRs (*see* Pet'r Br. at 17-22; *infra*, Part II), this Court has jurisdiction to review that claim as well. *See Francis*, 532 F.2d at 272.

ditional standards of fairness encompassed in due process of law.") Although the Supreme Court has recognized that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens,'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)), it never has held that LPRs in removal proceedings are outside the scope of the due process clause. The Supreme Court has consistently reaffirmed this position, most recently in 2003. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.") (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)); *see also Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation, . . . and . . . we developed the rule that a continuously present resident alien has a right to due process in such a situation.") (internal citations omitted); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing precedent supporting principle that aliens in deportation proceedings are entitled to due process).

Similarly, in *Burger v. Gonzales*, 498 F.3d 131 (2d Cir. 2007), this Court explicitly recognized an immigrant's right to due process in deportation proceedings, even where the relief sought is discretionary. In reviewing the BIA's "purely discretionary" denial of an asylum applicant's motion to reopen, this Court noted that "[a]liens, of course, are entitled to

due process" and that they "must be afforded the opportunity to be heard at a meaningful time and in a meaningful manner." *Burger*, 498 F.3d at 134-36 (internal citations omitted) (citing Supreme Court precedent and holding that BIA deprived petitioner of due process where it reversed IJ's grant of asylum solely on the basis of administratively noticed facts and did not permit petitioner the opportunity for rebuttal). Accordingly, this Court found that "[t]o establish a violation of due process, an alien must show 'that she was denied a full and fair opportunity to present her claims' or 'that the IJ or BIA otherwise deprived her of fundamental fairness.'" *Id.* (quoting *Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 155 (2d Cir. 2006)); *see also Chen*, 434 F.3d at 154-55, *reh'g granted, vacated on other grounds*, *Chen*, 471 F.3d at 315 (noting that petitioner's due process claim arising from BIA's discretionary determination that petitioner had failed to demonstrate "changed" or "extraordinary" circumstances with respect to her asylum application, presented a reviewable constitutional issue); *United States v. Perez*, 330 F.3d 97, 101-03 (2d Cir. 2003) (holding that counsel's failure to timely file an application for Section 212(c) relief violated alien's due process right to effective assistance of counsel); *Cekic v. INS*, 435 F.3d 167, 170-71 (2d Cir. 2006) (finding, in the context of an application for asylum and withholding of removal, that counsel's representation violated alien's due process right to effective counsel); *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) (holding that, in the context of an alien requesting relief under

212(c), "the Due Process clause and the Immigration and Nationality Act affords an alien the right to counsel of his own choice at his own expense"). Thus, this Court's own precedent belies the Government's argument in this case that an alien seeking discretionary relief is not entitled to assert due process rights—a fact the Government fails to mention.[3]

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[3] Tellingly, nearly all of the cases relied upon by the Government are outside the context of immigration law and relate to circumstances inapposite to those here. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (non-tenured assistant professor who was not rehired lacked any liberty or property interest to pursue due process claim); *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998) (police officer who was denied promotion had no constitutionally protected liberty or property interest); *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986) (child pornography statutes were unambiguous so as to satisfy the requirements of due process); *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002) (criminal detainee's access to telephones was not constitutionally protected liberty interest); *Roberts v. Spalding*, 783 F.2d 867 (9th Cir. 1986) (state regulations allowing prison inmates to obtain supplemental medical care did not create constitutionally protected liberty interest in such treatment); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (state's clemency process did not violate due process); *Olim v. Wakinekona*, 461 U.S. 238 (1983) (inmate's interstate transfer did not deprive inmate of any liberty interest); *Moran v. Godinez*, 57 F.3d 690 (9th Cir. 1995) (state's law relieving criminal defendant from bearing the burden of proof as to incompetence did not create a substantive due process right); *FDIC v. Henderson*, 940 F.2d 465 (9th Cir. 1991) (state law's procedural requirements created a property interest in employment contract). Moreover, even when the Government cites cases that actually relate to immigration law, they concern questions of substantive due process that are not at issue in this case. *See Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (immigrant did not have substantive due process right to stay in the Unit-

The Government inexplicably relies upon cases from various Circuit Courts of Appeal outside the Second Circuit, but fails to cite a single case from this Court. Resp't Br. at 16-17. These cases, however, are not precedent for this Circuit and are in direct conflict with the law in this Circuit. For example, *Etchu-Njang v.Gonzales*, 403 F.3d 577, 585 (8th Cir. 2005), *Dave v. Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004), and *Garcia v. U.S. Att'y General*, 329 F.3d 1217, 1224 (11th Cir. 2003), each narrowly held that an immigrant's claim of ineffective assistance of counsel in the process of applying for discretionary relief cannot constitute a violation of due process. These cases, however, clearly conflict with the binding case law from this Court, which holds that an immigrant in removal proceedings has a right to effective counsel under the Fifth Amendment—even where the relief sought it discretionary. *Perez*, 330 F.3d at 101-03; *Cekic*, 435 F.3d at 170-71; *Montilla*, 926 F.2d at 166.

Furthermore, the Government's position would deny aliens, including LPRs, the due process protections of the Fifth Amendment for most of the immigration hearings administered by the Government, as most relate to discretionary relief. By the Government's logic, a person in removal proceedings—even a[n] LPR—is protected by the due process of the constitution only if the relief sought is non-discretionary. However, the only non-discre-

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ed States); *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2006) (returning LPR did not have a substantive due process right to be admitted to the United States).

tionary forms of relief are withholding of removal and relief under the Convention Against Torture ("CAT"). 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16(c), 208.17. These forms of relief require that when a person demonstrates that it is more likely than not that she will face persecution or torture if returned to her home country, the United States government shall not remove her to that country. *Id.* In contrast, other forms of immigration relief, including cancellation of removal, asylum and waivers of inadmissibility, may be withheld on discretionary grounds even where the alien is statutorily eligible. *See, e.g.*, 8 U.S.C. § 1229b(a); 8 U.S.C. § 1158. The Government's position that the due process clause is inapplicable where an alien has no mandatory entitlement to the relief sought would therefore mean that essentially only aliens seeking review of denials of withholding of removal or CAT relief would be able to assert constitutional claims. That position would leave a wide path for immigration authorities to ignore virtually all notions of fundamental fairness and aliens without the safeguards of judicial review. This, of course, is inconsistent with the concept of due process and would essentially render meaningless with respect to most immigration proceedings this Court's power under 8 U.S.C. § 1252(a)(2)(D) to review constitutional questions.

B. Ms. Henry Has Presented Constitutional and Legal Claims

The Government next argues that Ms. Henry's challenge to the denial of her applications for a waiver under INA Section 212(h) and for cancellation of removal is "directed at the agency's discretionary and factual determinations that are outside the scope of judicial review." Resp't Br. at 19-22. However, this Court has express authority to consider constitutional claims and to review "questions of law" related to applications for discretionary relief. 8 U.S.C. § 1252(a)(2)(D); *Chen*, 471 F.3d at 324. In addition, where "a petitioner argues that [the BIA] applied an erroneous legal standard in making a discretionary determination, the petitioner raises a question of law," which this Court has jurisdiction to review. *Khan v. Gonzales*, 495 F.3d 31, 35 (2d Cir. 2007). These are exactly the types of questions that are presented here.

As discussed more fully in Ms. Henry's opening brief (Pet'r Br. at 16-31, and in Part II *infra*), Ms. Henry raises constitutional claims and questions of law that are properly within this Court's jurisdiction. First, Ms. Henry has presented an equal protection claim (and a question of law) in challenging the BIA's failure to address the IJ's erroneous determination that she was ineligible for Section 212(h) relief without a concurrent application for adjustment of status. JA at 000007 (BIA Dec. at 5); JA at 000170 (IJ Dec. at 20). Based on this incorrect interpretation of who may apply for this type of waiver, neither the IJ nor the BIA ever properly considered the threshold issue of

Ms. Henry's statutory eligibility for relief and thus violated her constitutional rights. *Id.*

Next, Ms. Henry submits that the BIA also erred as a matter of law when it affirmed the IJ's denial of Ms. Henry's Section 212(h) application on the same basis that the IJ denied Ms. Henry's application for cancellation of removal. Unlike with cancellation of removal, a Section 212(h) waiver requires a finding of the existence of the statutory prerequisite of "extreme hardship" to a U.S. citizen spouse, parent or offspring. INA § 212(h) (8 U.S.C. § 1182(h)). While a showing of extreme hardship does not create automatic entitlement to Section 212(h) relief "once established it is [a] favorable factor to be considered." *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 301 (BIA 1996). In Ms. Henry's case, the IJ and the BIA not only failed to make an explicit a finding as to the existence of extreme hardship, but even where the IJ and BIA assumed that all the statutory requirements for Section 212(h) relief had been satisfied, proceeded to ignore extreme hardship as a factor to be considered. JA at 000170 (IJ Dec. at 20); JA at 000007 (BIA Dec. at 5). Instead, the IJ and BIA relied solely upon the IJ's separate finding of hardship in the context of Ms. Henry's application for cancellation of removal. *Id.* This is inconsistent with the BIA's own legal standard, which requires that a factor to be considered in determining whether to grant 212(h) relief is the existence of, not simply hardship or severe hardship (as is sufficient in the context of cancellation of removal), but the statutorily prerequisite of extreme hardship. Whether the IJ and the BIA erred in not following the BIA's

own legal standard is certainly a question of law reviewable by the Court. *Khan*, 495 F.3d at 35. Moreover, because the IJ and BIA applied the erroneous legal standard and analysis, Ms. Henry was deprived of her due process right to fundamental fairness. *Burger*, 498 F.3d at 134. Thus, Ms. Henry also presents a constitutional claim with respect to her Section 212(h) application that is properly before this Court.

Third, Ms. Henry submits that in denying her application for cancellation of removal, the IJ and BIA improperly relied upon the existence of recent arrests and unproven charges pending against her to effectively nullify the factors favoring Ms. Henry's application. The IJ did this even after he had closed proceedings before such arrests and unproven charges could be resolved. This is inconsistent with the BIA's legal standards, which prohibit the mere fact of an arrest to be probative of criminal conduct and refuses to give arrests substantial weight absent a conviction or other corroborating evidence. *In re Catalina Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995) (noting BIA's hesitance "to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein."); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 816 (9th Cir. 1994) (holding that the BIA cannot find "the *mere fact* of arrest probative of whether Petitioner had engaged in underlying conduct"). This clearly presents a question of law. Moreover, by relying on unproven charges that were not probative of any underlying conduct, the IJ and BIA again violated Ms. Henry's due process right to fun-

damental fairness. *See Montero v. INS*, 124 F.3d 381, 385-86 (2d Cir. 1997); (evidence submitted in removal proceedings against an alien must be "probative" and its use must be "fundamentally fair."); *see also Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 268 (2d Cir. 2006); *cf. Blakely v. Wash.*, 542 U.S. 296 (2004) (holding that in the context of sentencing guidelines that, other than fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). This claim therefore also presents a justiciable constitutional issue.

Finally, Ms. Henry claims that the IJ and BIA erred in finding that Ms. Henry had failed to demonstrate rehabilitation because of Ms. Henry's insistence of innocence with respect to certain conduct. This is contrary to the legal standards imposed on the BIA, which prohibit adverse rehabilitation findings based solely on claims of innocence. *See Guillen-Garcia v. INS*, 999 F.2d 199, 204-05 (7th Cir. 1993). This claim therefore raises a question of law that is properly before this Court.

Ms. Henry's claims have nothing to do with the discretionary and factual determinations of the IJ and BIA. Rather, the denials of Ms. Henry's applications for relief were fundamentally flawed by constitutional and legal errors. Ms. Henry is entitled to an examination of her case that is respectful of her due process and equal protection rights and in compliance with applicable legal standards. *Burger*, 498 F.3d at 134-35; *Montero*, 124 F.3d at 385-86.

II. THE GOVERNMENT HAS FAILED TO ADDRESS FULLY OR REFUTE MS. HENRY'S REVIEWABLE CLAIMS

Rather than addressing the merits of Ms. Henry's claims, the Government has focused its efforts in either trying to portray Ms. Henry's constitutional and legal issues as mere challenges to discretionary determinations or hastily brushing Ms. Henry's claims aside as "moot." In the process, the Government has failed to substantively address Ms. Henry's arguments on appeal. Because Ms. Henry's claims are meritorious and remain generally uncontested, Ms.Henry's petition should be granted.

A. Ms. Henry's Equal Protection Challenge To Section 212(h) Is Meritorious And Is Not Moot

Ms. Henry, as a matter of equal protection, is eligible to directly apply for Section 212(h) relief without a concurrent application for adjustment of status. The Government fails to contest this argument. Instead, it asks this Court to ignore the issue because the IJ's and BIA's alternative basis for denying Ms. Henry's Section 212(h) waiver application rendered the issue moot. Resp't Br. at 24. The Government's position, however, rests on the erroneous assumption that the IJ's and BIA's alternative grounds for rejecting Ms. Henry's Section 212(h) application were properly dispositive—which they were not.

A case becomes moot when it no longer satisfies the "case-or-controversy" requirement of Article III, Section 2 of the Constitution. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 51 (2d Cir. 2004) (citing

Spencer v. Kemna, 523 U.S. 1, 7 (1998)). In order to satisfy this requirement, the petitioner must, at all stages of the litigation, have suffered, or be threatened with, an actual injury which is likely to be redressed by a favorable judicial decision. *Id.*

Here, Ms. Henry has suffered an injury redressable by a favorable decision of this Court. She was improperly denied a waiver under INA Section 212(h). As explained in Part I *supra*, Ms. Henry presents a reviewable constitutional claim and question of law challenging the denial of her Section 212(h) on the same basis as her cancellation of removal. This denial constituted a violation of Ms. Henry's right to due process and was in contravention of BIA's own legal standards. As discussed in further detail below, had the extreme hardship to Ms. Henry's children (as opposed to simply hardship or even severe hardship) been considered—as required by law—there may have been a different outcome to the IJ's determination with respect to Ms. Henry's Section 212(h) relief. Because the denial in the alternative of Ms. Henry's Section 212(h) application was premised on legal error, it cannot be dispositive. Thus, whether Ms. Henry is entitled to Section 212(h) relief without a concurrent application for adjustment of status is eminently at issue and satisfies the case or controversy requirement of Article III.

Furthermore, the requirement that Ms. Henry apply for adjustment of status in order to [be] eligible for Section 212(h) relief is based on a classifications—whether an alien has traveled abroad—that has long been held to be without a rational basis.

Francis, 532 F.2d at 268; *see also* Pet'r Br. at 18-20. Had Ms. Henry traveled abroad and returned to the United States, she would have been eligible for a Section 212(h) waiver *nunc pro tunc* without the need for an adjustment of status. *See In re Sanchez*, 17 I. & N. Dec. 218, 222-23 (BIA 1980). However, because Ms. Henry has never left the United States since entering as a[n] LPR, she was deemed ineligible for Section 212(h) relief without a concurrent application for adjustment of status. JA at 000170 (IJ Dec. at 20). "To claim . . . that [the petitioner] belongs to a different classification of persons simply by virtue of [her] failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary, and is without a fair and substantial relation the the object of the [relevant] legislation." *Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1995) (citations and internal quotations omitted). This Court should continued to follow "*Francis*'s mandate to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Blake v. Carbone*, 489 F.3d 88, 104 (2d Cir. 2007) (quoting *Francis*, 532 F.2d at 273).

B. The Government Has Failed To Address The BIA's and IJ's Use Of An Improper Standard In Adjudicating Ms. Henry's Application For Section 212(h) Relief

Because Ms. Henry is eligible for Section 212(h) relief, she was entitled to a proper adjudication of her application. The IJ and then the BIA, how-

ever, acted inconsistently with the statutory requirements of INA Section 212(h) and the BIA's own legal standards by denying Ms. Henry's waiver application on the same grounds that the IJ relied upon to deny Ms. Henry's application for cancellation of removal. JA at 000170 (IJ Dec. at 20); JA at 000007 (BIA Dec. at 5). In its effort to portray this issue as a challenge of a discretionary determination, the Government once again fails to address the merits of Ms. Henry's argument.

INA Section 212(h) relief expressly requires a finding of the statutory requirement of extreme hardship. INA § 212(h) (8 U.S.C. § 1182(h)). While an IJ need not make express rulings concerning statutory eligibility, and may move directly to a discretionary denial of relief in appropriate cases, *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976), in the context of Section 212(h), once extreme hardship is established, it must be considered as a favorable factor in any subsequent analysis. *Mendez-Moralez*, 21 I. & N. Dec. at 301. This did not happen in Ms. Henry's case.

The record does not contain any evidence that the IJ or the BIA made a finding of extreme hardship. The IJ's initial eligibility ruling was based solely on Ms. Henry's failure to make a concurrent application for adjustment of status. JA at 000170 (IJ Dec. at 20). Even when the IJ and BIA assumed *arguendo* that Ms. Henry was statutorily eligible to directly apply for Section 212(h) relief, no express ruling of extreme hardship was ever made, nor was extreme hardship considered as a factor in analyzing Ms. Henry's application. JA at 000170

(IJ Dec. at 20); JA at 000007 (BIA Dec. at 5). Instead, the IJ and BIA simply adopted the IJ's analysis of Ms. Henry's cancellation of removal application. *Id.* The IJ's finding, in the context of the cancellation of removal application, was limited to a finding that Ms. Henry's removal would lead to "severe emotional and economic hardship" for her children. JA at 000167 (IJ Dec. at 17). While this is a finding of some type of hardship, the IJ was unclear about whether Ms. Henry was analyzing hardship for purposes of cancellation of removal or for extreme hardship as required by Section 212(h). Thus, the analysis upon which the IJ and BIA relied upon to deny Ms. Henry's Section 212(h) relief was fundamentally flawed.

Had there been an explicit finding and analysis of the existence of extreme hardship to Ms. Henry's children—as is required by Section 212(h) and BIA's own legal precedent—the balance of equities specific to Ms. Henry's 212(h) application may have been different. *See, e.g., Bastanipour v. INS*, 980 F.2d 1129, 1130-31 (7th Cir. 1992) (holding that BIA's denial of asylum based on non-enunciated discretionary grounds was improper notwithstanding BIA's explicit findings concerning its denial of alternative application for Section 212(c) relief, where balancing of factors might incline differently had BIA made explicit findings of statutorily required showing of well-founded fear of persecution); Pet'r Br. at 25-26. The Government fails to address this central argument in its brief and, accordingly, Ms. Henry's argument is uncontested on this point.

Whether the IJ would have ultimately come to the same conclusion using the proper standard is purely speculative at this juncture. Ms. Henry's application for Section 212(c) relief was denied based on an improper standard, which was inconsistent with the established rules of the BIA and a denial of Ms. Henry's right to due process. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626-27 (1986) (requiring agency decision to be based on proper rationale and factual basis). Ms. Henry's case should be remanded for a proper determination of her Section 212(h) application that is consistent with the applicable legal standard and the requirements of due process. *See Li v. INS*, 453 F.3d 129, 136-42 (2d Cir. 2006) (requiring remand to the BIA because "we cannot state with confidence that the BIA would reach the same result in the absence of errors").

C. The Government Has Failed To Address Fully The Legal Errors in The IJ's And BIA's Determination Of Ms. Henry's Application For Cancellation Of Removal

As with their determination of Ms. Henry's Section 212(h) waiver application, the BIA's and IJ's analysis of Ms. Henry's application for cancellation of removal was fundamentally flawed. The BIA and IJ improperly relied upon the existence of unproven charges and Ms. Henry's insistence of innocence to deny Ms. Henry's application for cancellation of removal. This was inconsistent with the governing legal standards and, in the case of the BIA's and IJ's reliance on unproven charges, a violation of

Ms. Henry's right to due process. The Government, in its brief, fails to address fully these arguments, relying instead on a misconstruction of the record.

Contrary to the Government's assertions, the IJ improperly relied upon the existence of unproven charges and Ms. Henry's insistence of innocence as effectively dispositive grounds and thereby nullified two positive factors in favor of Ms. Henry's application: the hardship Ms. Henry's family would suffer if she were removed and Ms. Henry's rehabilitation. JA at 000167-168 (IJ Dec. at 17-18); JA at 000005 (BIA Dec. at 3).

With respect to the potential hardship faced by Ms. Henry's children the IJ noted that "when the record was closed in this case, [Ms. Henry] was awaiting trial for two separate misdemeanor charges," and found that it was "hard to conclude, with any certainty, that even if Ms. Henry were to remain in the United States, she would remain with her children." JA at 000167 (IJ Dec. at 17). The logical inference of the IJ's reasoning, which the Government fails to address, is that the IJ impermissibly inferred from the recent arrests and unproven charges that Ms. Henry was in fact guilty of the offenses for which she was arrested and would thus be unable to remain with her children.[4]

[4] The BIA, in its decision, interpreted the IJ's reasoning differently, stating "We thus find that the Immigration Judge did not erroneously speculate on the outcome of the pending charges, but instead determined that the weight to be attributed to the hardship that the respondent's family would face upon her removal was reduced by the fact that respondent had been separated from her children in the past due to her criminal conduct and by her failure to demonstrate meaning-

This is in direct conflict with the applicable legal standard, which prohibits "the mere fact of arrest" to be "probative of whether petitioner had engaged in underlying conduct."[5] *Paredes-Urrestarazu*, 36 F.3d at 816; *see also In re Catalina Arreguin de Rodriguez*, 21 I. & N. Dec. at 42 (holding that arrest without convictions or corroborating evidence should not be given substantial weight). It is also a violation of Ms. Henry's due process right to fundamental fairness. *Montero*, 124 F.3d at 385-86.

The IJ also relied upon the existence of unproven charges and on Ms. Henry's insistence of innocence to effectively nullify any finding of rehabilitation.

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ful rehabilitation that would prevent separations in the future." JA at 000005 (BIA Dec. at 3). This simply does not follow from the IJ's decision. If the IJ had meant to rely on Ms. Henry's past criminal conduct, then he would have done so without consideration of recent arrests and pending charges, which are, in any event, not probative of any past conduct. To the extent the IJ relied upon the recent arrests to nullify evidence of rehabilitation, that was also improper for the reasons stated above.

[5] The Government cites *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978), for the proposition that an IJ may consider evidence of new arrests and criminal charges in determining whether to grant discretionary relief. While an immigration judge may consider an alien's criminal record under *Marin*, such consideration must be made in light of the BIA's own standards requiring that arrests without convictions must be given minimal or no weight. *See Paredes-Urrestarazu*, 36 F.3d at 816; *Catalina Arreguin de Rodriguez*, 21 I. & N. Dec. at 42. In Ms. Henry's case, the IJ improperly considered unproven allegations to make dispositive determinations in contravention of these legal standards and Ms. Henry's due process rights.

See JA at 000168 (IJ Dec. at 18) (noting recent arrests and finding "hard to give credence to [Ms. Henry's] claims of rehabilitation," and further noting Ms. Henry's claims of innocence as "further weaken[ing]" Ms. Henry's claims of rehabilitation). Notwithstanding the Government's assertions, the IJ's decision demonstrates that the IJ's findings regarding rehabilitation were based exclusively on two improper grounds: pending unproven charges and Ms. Henry's claims of innocence. *Id.* This is in contravention of the governing legal standard. To the extent the IJ relied upon the existence of unproven charges to nullify a showing of rehabilitation, the IJ impermissibly made such unproven charges "probative of whether petitioner had engaged in underlying conduct." *Paredes-Urrestarazu*, 36 F.3d at 816. To the extent the IJ relied upon Ms. Henry's claims of innocence, the IJ contradicted the legal requirement that refusal to acknowledge guilt regarding convictions cannot alone negate a finding of rehabilitation. *See Guillen-Garcia*, 999 F.2d at 204-05.

Thus, the IJ and BIA relied upon improper grounds in making dispositive determinations in its analysis of Ms. Henry's application for cancellation of removal. Had such grounds not been considered (or in the case of arrests, if considered, given minimal weight), as is required by the applicable legal standard, the determination of Ms. Henry's cancellation of removal application may have come out differently. *Li*, 453 F.3d at 136-42 (holding that errors by the BIA made it impossible to determine, with certainty, that the BIA would reach the same conclusion absent

the errors). As with Ms. Henry's application for Section 212(h) relief, it is speculative at this juncture whether the IJ may have arrived at the same conclusion had such grounds not been considered. The central issue before this Court is whether, in light of the dispositive way in which the IJ relied upon Ms. Henry's arrests and claims of innocence, Ms. Henry's application was subjected to a fundamentally flawed—and fundamentally unfair—analysis. *See Burger*, 498 F.3d at 135 (holding that the consideration of improper evidence in deportation proceedings violates due process); *Khan*, 495 F.3d at 35 (stating that Section 212(c) waiver, though it contains a discretionary component, should not be denied on the basis of an erroneous legal standard). Ms. Henry's case should be remanded so that her application for cancellation of removal, as well as her application for Section 212(h) relief, can be examined in a manner that is consistent with applicable legal standards and respectful of her due process rights. *Li*, 453 F.3d at 136-42.

CONCLUSION

For the reasons stated above and in her opening brief, Ms. Henry respectfully requests that her petition be granted, that the BIA's decision be reversed and that the case be remanded to the BIA with instructions to return the matter to the IJ for a new determination of Ms. Henry's applications for a waiver of inadmissibility under INA § 212(h) (8 U.S.C. § 1182(h)) and for cancellation of removal under INA § 240A(a) (8 U.S.C. § 1229b(a)).

Dated: New York, New York
November 5, 2007

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with Federal Rule of Appellate Procedure 35(a) because it contains 5,057 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman font.

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
Board of
IMMIGRATION APPEALS

File No.: A 38-619-316

In the Matter of:

Jenny Lee Henry

In Removal Proceedings

RESPONDENT'S APPEAL BRIEF

This appeal is not appropriate for affirmance without opinion under 8 C.F.R. § 1003.1(a)(7), and should be reviewed by a three-member panel.

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Respondent, Jenny Lee Henry, through undersigned counsel, hereby appeals the Immigration Judge's denial of her applications for cancellation of removal pursuant to INA § 240(A)(a) and for waiver of inadmissibility under INA § 212(h).

SUMMARY OF ARGUMENT

In denying cancellation of removal, the Immigration Judge erred as a matter of fact and law in failing to exercise his discretion in favor of Ms. Henry. In particular, the Immigration Judge erred in the exercise of his discretion by (i) not giving greater weight to the severe hardship the Immigration Judge acknowledged Ms. Henry's family, particularly her five minor U.S. citizen children, would suffer as a result of Ms. Henry's removal; and (ii) failing to give sufficient weight to factors evidencing Ms. Henry's rehabilitation, such as the absence of any criminal conviction since 2003 and Ms. Henry's participation in a rehabilitation program for chronic shoplifters. Moreover, the Immigration Judge erred as a matter of law and violated Ms. Henry's constitutional right to procedural due process by heavily relying on misdemeanor charges still pending at the close of proceedings as adverse factors against Ms. Henry. The Immigration Judge was also clearly erroneous in making certain findings, including his adverse credibility determination and other findings concerning Ms. Henry's criminal record.

Finally, the Immigration Judge also erred as a matter of law in denying Ms. Henry's application for waiver of inadmissibility under INA § 212(h). The Immigration Judge deprived Ms. Henry of her due process rights under the Fifth Amendment to the U.S. Constitution in finding her ineligible on the sole basis that Ms. Henry was a previously admitted non-citizen. Furthermore, to the extent the Court ruled that it would have denied INA § 212(h) relief even if, assuming *arguendo*, Ms. Henry was eligible for such relief, the Immigration Judge also made a legal error in failing to use the standard of "extreme hardship" that would be suffered by Ms. Henry's family as a result of Ms. Henry's removal and in improperly interpreting INA § 212(h) as requiring a balancing of factors similar to that applied under cancellation of removal pursuant to INA § 240A(a).

For all the foregoing reasons, the Board should reverse the decision of the Immigration Judge and grant Ms. Henry the relief she is seeking, or, in the alternative, remand the decision to an Immigration Judge for further proceedings.

STATEMENT OF FACTS

Jenny Lee Henry emigrated emigrated from Guyana twenty-two years ago, in 1984, in search for a better environment, a better job and an opportunity to uplift her life, and was admitted into the United States as a lawful permanent resident

("LPR"). Application for Cancellation of Removal (Ex. 4);[1] Tr. at 103. Since Ms. Henry moved to the U.S. in 1984, she has never been back to Guyana. Tr. at 92. Except for one aunt who remains in Guyana, with whom Ms. Henry speaks only sporadically, Ms. Henry no longer has any ties to that country. Tr. at 88-90. All of her immediate family, including her parents and siblings, are either LPRs or U.S. citizens and are currently living in the U.S. Tr. at 81-83. In particular, Ms. Henry's mother, Lucille Charles, whom Ms. Henry visits weekly, is a naturalized citizen. Tr. at 81. Ms. Henry's father, Clarence Arthur Boston, was admitted to the United States as an LPR on August 28, 2005. Copy of Passport Pages of Clarence Arthur Boston (Ex. 21).

Ms. Henry is the mother and sole caretaker of five minor daughters, all of whom are U.S.-born citizens: Shanequia Shantha Henry (16 years old), Oneika Shamari Henry, (15 years old), Tameika Aneisha Henry (11 years old), Alizah Zaneshia Henry, (9 years old) and Asha Vanesha Henry, (8 years old). Tr. at 107 (noting that Ms. Henry is [the] only adult in [the] household); Application for Cancellation of Removal (Ex. 4); (Birth Certificates for Ms. Henry's Children (Ex. 7K). Ms. Henry's children are all in school (Tr. at 71-76) and have lived their entire lives in the U.S. Tr. at 123. None of Ms. Henry's children has ever traveled to Guyana. *Id.* Ms. Henry's second-oldest daughter,

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[1] All Exhibits refer to the Immigration Judge's list of Exhibits set forth in the Decision and Order of Immigration Judge dated December 9, 2005 ("I.J.").

Oneika, suffers from eczema since birth and receives Supplemental Social Security Income. Tr. at 74, 79; Proof of Bank Account for Oneika Henry (Ex. 7R). The Immigration Judge recognized that it is unlikely that Oneika would receive the same level of medical treatment in Guyana and further recognized that the opportunities for all of Ms. Henry's daughters would be far more limited than opportunities in the United States. I.J. at 17; *See also* Tr. at 105 (Immigration Judge noting that "I take it the Government doesn't have any issue with the economy in the U.S. is a whole lot better than Guyana . . . It's also safer in this country I think based on the facts."); Tr. at 387 (Immigration Judge noting that "you don't have to convince me that life is probably a whole lot better in the States than it is [in] Guyana").

Ms. Henry is effectively the sole financial supporter for her five children. The father of Ms. Henry's three youngest children, Andre Scantlebury, is currently serving a prison sentence following a drug conviction. Tr. at 220-226; Materials Relating to Andre Scantlebury's Criminal Record (Ex. 25). While a Court ordered Mr. Scantlebury to pay $45 a week in child support, he has provided no support to Ms. Henry and her children since he was arrested in March 2003. Tr. at 231-232. The father of Ms. Henry's two oldest children, Patrick Dillon, has provided only limited support of $150 every two weeks since June 2001. Tr. at 233-235. While Ms. Henry's children received public assistance beginning in 1990, by August 2005, as part of a progressive reduction of such assistance, the chil-

dren's assistance was limited to $500 a month in foodstamps. Additional Responses to Form EIOR-42A (Ex. 7B); Tr. at 430, 460.

Throughout this period, Ms. Henry has worked hard to support her children. Ms. Henry has consistently been employed, or taken active steps to seek employment. *See* (Ex. 7B) (detailing employment and training since 1984); Letters from Employers (Ex. 23). Ms. Henry has filed tax returns for every year since 1998, with the exception of the year, in which she was in custody of the Immigration and Naturalization Service ("INS"). Respondent's Tax Returns (Ex. 7I). In June 2004, during the proceedings below, Ms. Henry's employment with Cabrini Care at Home, where she had been working as a home health aide since February 2003, was terminated. Respondent's Letter of Termination from Cabrini Care at Home dated June 21, 2004 (Ex. 22); Tr. at 328-29. Rather than resign herself to unemployment, Ms. Henry immediately sought a new job and engaged in a job training program to improve her search. Tr. at 330-331 (testimony concerning Ms. Henry's participation in employment training); Tr. at 427-429 (testimony regarding employment at a printery). As of the date of her last appearance before the Immigration Judge, Ms. Henry was working twenty-five hours a week at a glass manufacturing company. Tr. at 456-457 (testimony regarding employment at K&W Glass Company).

In addition to providing financial support for her children, Ms. Henry is deeply involved in the care and welfare of her children. She assists her daugh-

ters with with their homework (Tr. at 117; Letter of Support from Henry Children (Ex. 9)), consistently attends meetings with their teachers (Tr. at 120), and encourages her children to participate in school events such as food drives (Tr. at 118-119). Ms Henry's care is demonstrated by the success of her daughters in school. All of Ms. Henry's daughters meet or exceed grade-level standards. Report Cards for 2002-2003 School Year (Ex. 7M); Tr. at 125 (testimony noting that two of Ms. Henry's daughters are A students and one is a B student); Letter of Support from Lucille Charles (Ex. 9) (noting that Ms. Henry's daughters attend school regularly, "do not miss out on class work," and that Ms. Henry assists them with their homework everyday"). In one instance, Ms. Henry's active communication with Shanequia's school and the Board of Education was instrumental in transferring Shanequia from a remedial eighth grade class, in which she had been unnecessarily placed, to a standard eighth grade class. Tr. at 121-22. In addition to being actively involved with her daughter's education, Ms. Henry is a good mother, who cooks and cleans for her children and ensures that they are healthy. Letters of Support from Henry Children (Ex. 9); Letter of Support from Lucille Charles (Ex. 9) (noting that Ms. Henry works to maintain her home with her five children); Tr. at 385 (testimony of Denise Adler noting that while Ms. Henry was in INS custody her daughters had health problems, including contracting ringworm and that such problems have not occurred since Ms. Henry has been released from custody).

For some time, Ms. Henry has had a problem with shoplifting, which she began to practice with the influence of certain acquaintances in an effort to obtain items she could not otherwise afford. Tr. at 129 (characterizing shoplifting as an effort to "make ends meet"); Tr. at 138 (discussing acquaintances). As time went on, however, shoplifting became a habit. Tr. at 188. Ms. Henry's problem with shoplifting has led to several arrests and convictions for petit larceny. Material Related To Respondent's Criminal Arrests And Convictions (Ex. 3). In September 2003, Ms. Henry pleaded guilty to burglary in the third degree—her only felony—a charge that stemmed from a nonviolent shoplifting incident similar to her past offenses. Materials related to Burglary Arrest (Ex. 17). Three of Ms. Henry's misdemeanor shoplifting conviction served as the basis for her charge of deportability. Notice to Appear served June 12, 2000 (Ex. 1).

Since September 2003, Respondent had not been convicted of any other crime. Rather, Respondent has demonstrated her strong desire to rehabilitate herself and live responsibly. Ms. Henry has made efforts to stay away from the former acquaintances that introduced her to shoplifting and has focused on her relationship with her children. Tr. at 172; Testimony of Denise Adler (Tr. at 380). Since her release from INS custody, Ms. Henry began attending Church on a weekly basis. Tr. at 369. In addition, Ms. Henry tackled her problems with shoplifting head-on and participated in a rehabilitation program for shoplifters, Shoplifters Alternative, which she

successfully completed. Tr. at 174; Letter from Shoplifters Alternative dated January 30, 2004 ("Shoplifters Alternative Letter") (Ex. 12). Upon completion of the program, Shoplifters Alternative determined that, based on Ms. Henry's responses to certain questions posed during the program, it appeared that Ms. Henry's shoplifting behavior was "less related to criminal intent and more the result of personal stress or other factors affecting [her] life." Shoplifters Alternative Letter (Ex. 12).[2] In conjunction with participating in rehabilitation program, the record indicates that Ms. Henry has made a concerted effort to set her life in order. She has focused on working hard so that she can have the money to buy the items she needs. Tr. at 188-89. At the same time she has accepted that when she does not have the means to purchase an item, she simply must wait. Tr. at 191. Ms. Henry's mother, Lucille Charles has noted that Ms. Henry's efforts to "improve her life and those who she deals with on a daily basis have grown beyond expectation." Letter of Support from Lucille Charles (Ex. 9).

Ms. Henry's misdemeanor convictions also include approximately eight convictions for disorderly con-

[2] Shoplifters Alternative was the second rehabilitation program in which Ms. Henry participated. In 1994, Ms. Henry participated in a court-mandated program in Hempstead, Long Island following a petit larceny conviction. Tr. at 174-79. Ms. Henry, however, testified that the court-mandated program was ineffective for several reasons, including that it was not specifically tailored for shoplifters, was court-mandated and not done at Ms. Henry's initiative, like Shoplifters Alternative, and consisted of simply watching videos. Tr. at 184-88.

duct and harassment and a small number of arrests for harassment and assault. Material Related To Respondent's Criminal Arrests And Convictions (Ex. 3). Each of these convictions appear to be isolated incidents arising from minor arguments with third parties, which did not involve any serious injury. *Id.*; Tr. at 150-52 (describing a 2001 harassment arrest stemming from a self-defense altercation). Ms. Henry's last conviction for disorderly conduct and harassment occurred in 1995. Material Related To Respondent's Criminal Arrests And Convictions (Ex. 3). She has never been convicted for assault.

Ms. Henry also has two convictions for endangering the welfare of a child. *Id.* These arrests stem from two isolated incidents that occurred over ten years ago. The first conviction stemmed from an incident in July 1993 when Mr. Henry left her two oldest (and at the time only) daughters in the care of a friend, in order to search for an apartment. Tr. at 201-02. Ms. Henry's daughters were subsequently left unattended by the friend. Tr. at 203-205. As a result of this conviction, Ms. Henry temporarily lost custody of her two daughters. Tr. at 211-12. Ms. Henry completed a court-mandated six-month parenting course and regained custody of her daughters after a year. Tr. 212-14. The second conviction stemmed from a separate incident in December 1995. Ms. Henry left her two youngest children at home for no more than thirty minutes in order to pick up Shanequia, her oldest daughter, from school, so as not expose her youngest daughters to the extremely cold weather of that day. Tr. at 208-211.

Since 1995, Ms. Henry has never been arrested, charged or otherwise convicted for charges of endangering the welfare of her children. Indeed, the record indicates that Ms. Henry has been a good and caring mother and that her daughters would suffer if she were not in their lives. Testimony of Denise Adler (Tr. 405-06); Letter of Support from Lucille Charles (Ex. 9); Letters of Support from Henry Children (Ex. 9).

PROCEDURAL HISTORY

The INS issued a Warrant for Arrest of Alien (Form 1-200) on May 24, 2000 (Ex. 1). On June 12, 2000, Ms. Henry was served with a Notice to Appear while in custody, charging her with deportability pursuant to Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act ("INA"), as an admitted alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. *Id.* The Notice to Appear cited two convictions for petit larceny, which were entered on January 10, 2000 and March 14, 2000. *Id.* An additional conviction for petit larceny dated October 5, 1987 was subsequently added as a basis for the charge. *Id.* As of June 13, 2000, Ms. Henry was detained in the Avoyelles Women's Correctional Facility in Cottonport, Louisiana. *Id.*

On June 13, 2000, Ms. Henry appeared before the Immigration Court in Oakdale, Louisiana. The Oakdale Court denied her application for cancellation of removal under INA § 240(A)(a) on December 12, 2000, on the basis that her application was

time-barred, and ordered Ms. Henry removed to Guyana. *Id.*

Ms. Henry appealed that decision to the Board. *Id.* On March 23, 2001, the Board affirmed, without opinion, the decision of the Immigration Judge. Ms. Henry, through counsel, submitted a motion to reconsider, arguing that the "stop-time" rule in INA § 240(A)(a), enacted in 1996, could not be applied to Ms. Henry's 1987 conviction without violating the *ex post facto* clause of Art. I, § 9, Cl. 3 of the U.S. Constitution. *Id.* On May 15, 2001, the BIA denied Ms. Henry's motion to reconsider. I.J. at 3.

Ms. Henry appealed to the United States District Court for the Southern District of New York ("S.D.N.Y."), seeking a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241, vacating her order of removal and declaring her eligible to apply for cancellation of removal pursuant to INA § 240(A)(a) and a waiver of inadmissibility under INA § 212(h). *Id.* While her petition was pending, Ms. Henry was granted supervised release in June 2001 and she returned to New York City, where she remained. I.J. Dec. at 2. On November 30, 2001, the S.D.N.Y. granted Ms. Henry's petition, holding that the provisions of INA § 240(A)(a) that were enacted in 1996 and limit an applicant's ability to seek relief from an order of removal could not be applied retroactively. *Id.* The S.D.N.Y. remanded the case and directed the INS to permit Ms. Henry to file applications for cancellation of removal pursuant to INA § 240(A)(a) and a waiver of inadmissibility pursuant to INA § 212(h). *Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001); *Id.*

In a *per curiam* order dated June 10, 2002, the Board vacated its decision from March 23, 2001 and May 15, 2001. The Board remanded the case to the Immigration Court for further proceedings consistent with the S.D.N.Y.'s decision and order. *Id.*; Ex. 1. After Ms. Henry was granted a Motion to Change Venue on August 13, 2002, hearings at the Immigration Court of New York, New York commenced on January 29, 2003 before Immigration Judge Alan P. Page. *Id.*

On December 9, 2005, the Immigration Judge denied Ms. Henry's application for cancellation of removal under INA § 240(A)(a) and Ms. Henry's application for a waiver of inadmissibility under INA § 212(h). I.J. at 21. The Immigration Judge also ordered Ms. Henry removed to Guyana. *Id.*

On April 29, 2005, Ms. Henry timely filed a Notice of Appeal with the Board.

STATEMENTS OF THE ISSUES

1. Did the Immigration Judge err in the exercise of his discretion by failing to give sufficient weight to the severe hardship Ms. Henry's family would suffer as a result of Ms. Henry's removal and to evidence of Ms. Henry's rehabilitation and to?

2. Did the Immigration Judge make a fundamental legal and procedural error in relying heavily on unproven pending misdemeanor charges against Ms. Henry, in contravention of the Board's own legal standards and violat-

ing Ms. Henry's constitutional due process rights?

3. Did the Immigration Judge clearly err in his adverse credibility determination and certain other factual findings on Ms. Henry's criminal record?

4. Did the Immigration Judge deprive Ms. Henry of her right to due process under the Fifth Amendment to the U.S. Constitution in finding her ineligible for relief under INA § 212(h)?

STANDARD OF REVIEW

The Board reviews all questions of law, discretion and judgment, and all other issue in appeals from an Immigration Judge's decisions, other than factual determinations, *de novo*, 8 C.F.R. § 1003.1(d)(3)(iii).

The Board may review the Immigration Judge's factual determinations to determine whether they are "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

MS. HENRY'S CASE IS NOT SUBJECT TO SUMMARY AFFIRMANCE AND WARRANTS REVIEW BY A THREE JUDGE PANEL

This case is not appropriate for summary affirmance. A single member of the Board may affirm an Immigration Judge without any opinion where it is determined that: (i) the result reached by the Immigration Judge was correct; (ii) any errors were harmless or not material and (A) the issues o appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel fact situation or (B) the factual and legal issues raised are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(a)(7); 8 C.F.R. § 1003.1(e)(4)(i)(B). Ms. Henry's appeal warrants a written opinion by the Board because: (1) the Immigration Judge made several clearly erroneous factual determinations; (2) certain of the Immigration Judge's conclusions were incorrect as a matter of law; and (3) the errors committed by the Immigration Judge were significant and material.

Moreover, this appeal should be determined by a three-member panel. A single Board member "may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation." 8 C.F.R. § 1003.1(e)(5). In other cases, the Board member may refer the matter to three-member panel. *Id.* A case may be assigned to a three-member panel for adjudication of the merits where

there is a need to (i) settle inconsistencies among the rulings of different immigration judges; (ii) establish a precedent construing the meaning of laws, regulations and procedures, (iii) review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents; (iv) resolve a case of controversy of major national report; (v) review a clearly erroneous factual determination by an Immigration Judge; or (vi) reverse the decision of an Immigration Judge other than by the procedure for a brief order or a single Board member. 8 C.F.R. § 1003.1(e)(6).

Here, Ms. Henry's appeal warrants review by a three-member panel because it challenges certain of the Immigration Judge's decision as failing to conform with the law or applicable precedents; it requires a review of clearly erroneous factual determination by the Immigration Judge and Ms. Henry requests reversal of the decision of the Immigration Judge for grounds other than as set forth in 8 C.F.R. § 1003.1(e)(7). 8 C.F.R. § 1003.1(e)(6)(iii); 8 C.F.R. § 1003.1(e)(6)(v).

ARGUMENT

I. THE IMMIGRATION JUDGE ERRED IN FAILING TO EXERCISE HIS DISCRETION IN FAVOR OF MS. HENRY'S APPLICATION FOR CANCELLATION OF REMOVAL

Ms. Henry meets the statutory requirements set forth in INA. § 240A(a) and was improperly denied cancellation of removal by the Immigration Judge.

To be statutorily eligible for cancellation of removal under INA. § 240A(a), an applicant must (i) be lawfully admitted for permanent residence for not less than 5 years, (ii) have resided in the United States continuously for 7 years after having been admitted in any status and (iii) not have been convicted of any aggravated felony. INA § 240A(a), 8 U.S.C. INA § 1229b(a). In addition to satisfying statutory eligibility requirements, an applicant for relief must establish that he or she warrants such relief as a matter of discretion. In exercising discretion under INA § 240A(a) "an Immigration Judge, upon review of the record as a whole, 'must balance the adverse factors evidencing the applicant's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country.'" *Matter of C-V-T*, 22 I. & N. Dec. 7, 11 (BIA 1998) (quoting *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978)).

During the Immigration Court proceedings, it was undisputed that Ms. Henry had been lawfully admitted for permanent residence for not less than five years, had resided continuously for at least seven years after having been admitted to the United States[3] and had never been convicted of an aggra-

[3] In *Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001), the Honorable Denny Chin ruled that the clock-stopping provision introduced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (which stops the accrual of time for the purpose of INA § 240A's continuous residence requirement when an alien either is served with a

vated felony. Application for Cancellation of Removal (Ex. 4). The only thing left for the Immigration Judge to decide was whether Ms. Henry's favorable considerations outweighed her adverse factors so as to merit a favorable exercise of the Immigration Judge's discretion. *C-V-T*, 22 I. & N. Dec. at 11.

The Immigration Judge improperly denied Ms. Henry cancellation of removal by giving insufficient weight to evidence of the hardship that would be suffered by Ms. Henry's family if Ms. Henry were removed and to factors evidencing Ms. Henry's rehabilitation and relying on unproven misdemeanor charges pending against Ms. Henry at the close of proceedings. The Immigration Judge's opinion relies in this respect both on errors as a matter of law and clearly erroneous factual findings. In addition, the Immigration Judge erred in certain other factual findings regarding Ms. Henry's credibility and criminal record.

A. The Immigration Judge Erred in Giving Insufficient Weight to Evidence of Severe Hardship to Ms. Henry's Family

The Immigration Judge erred in the exercise of his discretion in not giving greater weight to the "severe emotional and economic hardship" that the Immigration Judge recognized will be suffered by

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notice to appear or commits certain offenses) could not be retroactively applied to Ms. Henry's circumstances. Judge Chin remanded Ms. Henry's case so that her application of cancellation of removal (and waiver of inadmissibility) could be properly considered.

Ms. Henry's family if Ms. Henry were removed. I.J. at 17.

Favorable factors to be considered in determining whether to grant cancellation of removal "include such factors as family ties within the United States, residence of long duration in this country," and "evidence of hardship to the respondent and [her] family if deportation occurs." *C-V-T*, 22 I. & N. Dec. at 11. Indeed, the potential hardship faced by minor U.S. citizen children upon removal of a single parent has been deemed a central factor in the determination of discretionary relief. *See, e.g., In re Ariadna Angelica Gonzalez Recinas, et al.*, 23 I. & N. Dec. 467, 469, 373 (BIA 2002) (granting cancellation of removal where single mother of four United States citizen children would result in significant hardship for those children).

As the Immigration Judge recognized, Ms. Henry is the sole caretaker of all five of her minor U.S. citizen children. I.J. at 17. If Ms. Henry is removed, there is no doubt that Ms. Henry's children will suffer extreme hardship. Ms. Henry's children will be forced either to travel to a country they have never visited, where—as the Immigration Judge noted in his opinion—their opportunities would be "far more limited than in the United States"[4] or be without their mother and her financial and emotion-

[4] Oneika Henry, who suffers from eczema since birth will be particularly prejudiced because, as the Immigration Judge recognized "it is unlikely that Oneika would receive the same level of medical treatment if she moved to Guyana with her mother." I.J. at 17.

al support. *Id.* If Ms. Henry is removed and her daughters remained in the United States, both the Immigration Judge and the trial attorney conceded that it is likely that they will be separated in foster care. Tr. at 305. The Immigration Judge erred in the exercise of his discretion in failing to take this into account.

In addition, the Immigration Judge erred in the exercise of his discretion in not giving appropriate weight to the ongoing serious medical condition of Ms. Henry's second child, Oneika, who has been suffering from eczema since she was born and receives Supplemental Social Security Income. Tr. at 74, 79; Ex. 7R. The Board has recognized that a "strong applicant [for cancellation of removal] might have a qualifying child with very serious health issues." *In re Francisco Javier Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63 (BIA 2001). Oneika Henry has required treatment since her birth and, as the Immigration Judge acknowledged, appropriate treatment for her condition is unlikely to be reasonably accessible in Guyana. Tr. at 17.

The Immigration Judge effectively dismissed these strong favorable factors by giving improper weight to certain adverse factors. First, the Immigration Judge improperly emphasized Ms. Henry's two criminal convictions for endangering the welfare of a child (I.J. at 17), without considering the mitigating circumstances surrounding each of these convictions. Tr. at 203-211. In one of the convictions, Ms. Henry testified that she, in fact, had left her children with a friend and it was this friend who subsequently left the children. Tr. at 203-05. In the second conviction,

Ms. Henry in an effort to protect her children from inclement weather, Ms. Henry left her youngest children for a minimal amount of time. Tr. at 208-11. Moreover, and more significantly, both of these convictions occurred over ten years ago (in 1993 and 1995). Ex. 20. Since 1995, Ms. Henry has not been arrested or convicted for any conduct constituting endangering the welfare of a child. Moreover the record includes corroborating testimony of Denise Adler, Ms. Henry's long-time friend, and a letter submitted by Ms. Henry's mother, both of which state that Ms. Henry is a caring and interested mother. Tr. at 384; Ex. 9. The Immigration Judge's reliance on two convictions over ten years old, therefore, was clearly erroneous.

The Immigration Judge also improperly relied on the existence of unproven charges pending against Ms. Henry when the Immigration Judge closed the proceeding, to speculate that Ms. Henry would not be around to care for her family if such charges culminated in a conviction and thereby gave insufficient weight to the hardship Ms. Henry's family would face upon her removal. I.J. at 17. As discussed in I.C, *infra*, this was erroneous as a matter of law and a violation of Ms. Henry's due process rights.

B. The Immigration Judge Erred in Failing to Give Sufficient Weight to Evidence of Ms. Henry's Rehabilitation

Among the favorable factors considered in determining whether to grant cancellation of removal, particularly where an applicant has a criminal record, is "proof of genuine rehabilitation." *C-V-T*,

22 I. & N. Dec. at 11. Ms. Henry has demonstrated such genuine rehabilitation. The Immigration Judge, however, found that Ms. Henry's claims of rehabilitation were weakened by other factors. I.J. at 17-18. The Immigration Court erred on several grounds:

The Immigration Judge erred in the exercise of its discretion in failing to give any weight to the fact that Ms. Henry has not been convicted of any crime since Ms. Henry's guilty plea on September 19, 2003. Ex. 3. Furthermore, the Immigration Judge erred in not considering as positive factors warranting a favorable exercise of discretion both the relative lack of seriousness of the offenses for which Ms. Henry was convicted (all but one resulted in misdemeanor convictions) and the fact that the conduct that resulted in convictions occurred over two years before the close of proceedings. *Id. See C-V-T*, 22 I. & N. Dec. at 16 (noting that where an applicant has a criminal record, an Immigration Judge should consider the "nature, *recency*, and *seriousness*" of such criminal record) (emphasis added).

In addition, the Immigration Judge failed to give greater weight to Ms. Henry's participation in the Shoplifters' Alternative rehabilitation program. The Immigration Judge's finding that Ms. Henry had "failed to give a persuasive explanation of why she felt the Shoplifters Alternative [rehabilitation program] was a more effective rehabilitation program than the court-mandated program she completed in 1994" was clearly erroneous. I.J. at 18. During her May 28, 2004 testimony, Ms. Henry went into significant detail explaining several reasons why

Shoplifters Alternative was a much more effective program. Ms. Henry stated that the Shoplifters Alternative program (i) was specifically tailored for individuals who have problems with shoplifting; (ii) provided Ms. Henry with specific things to do to avoid getting involved with shoplifting; (iii) had been voluntarily undertaken by Ms. Henry; and (iv) provided Ms. Henry with a helpline for additional post-program assistance. Tr. at 184-188.

The Immigration Judge's finding that "after both programs, Respondent continued to establish a pattern of . . . convictions" was also clearly erroneous. I.J. at 18. While Ms. Henry was arrested and convicted after the 1994 program, Ms. Henry has not been convicted for any crime since September 2003 and hence has not been convicted of any crimes since she completed the Shoplifters Alternative Program in January 2004. Ms. Henry was arrested after completion of Shoplifters Alternative. However, the Board has indicated that it is "hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein." *In re Catalina Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995). The record contains no corroborating evidence with respect to any arrests that occurred after September 2003 and thus, the Immigration Judge erred as a matter of law in heavily relying on such arrests absent convictions or corroboration.

The Immigration Judge also erred in its finding that Ms. Henry failed to demonstrate rehabilitation where the Immigration Judge's basis for such a finding was Ms. Henry's insistence of innocence with

respect to certain of her arrests and/or convictions. I.J. at 18. First, the Immigration Court failed to consider the fact that, notwithstanding Ms. Henry's insistence that she did not commit certain specific offenses, Ms. Henry in fact admitted that she had committed the majority of her offenses and that "[she knew she] was doing something wrong." Tr. at 187. *See also* Tr. at 127-40; 229-30; 253; 256-59; 261-63; 266-67, 276, 289. Ms. Henry also admitted her conduct implicitly by testifying that she requested a referral from her counsel for a rehabilitation program to address her shoplifting problem, (Tr. at 174) and that she was working to turn her life around to avoid shoplifting in the future. Tr. at 184-88. The Immigration Judge's failure to taking this testimony and evidence into account was clearly erroneous.

Second, as a matter of law, U.S. courts have held that refusal to acknowledge guilt regarding convictions cannot alone negate finding of rehabilitation. *See, e.g., Guillen-Garcia v. INS*, 999 F.2d 199, 204-205 (7th Cir. 1993). Thus, to the extent the Immigration Judge based its determination that Ms. Henry had failed to demonstrate rehabilitation solely on Ms. Henry's insistence that she was innocent of certain conduct for she was arrested and/or convicted, Immigration Judge erred as a matter of law.

C. The Immigration Judge Erroneously Relied Upon Unproven Misdemeanor Charges Pending Against Ms.Henry at the Close of Proceedings

The Immigration Judge closed the proceedings and the record on October 7, 2005 notwithstanding the existence of pending misdemeanor charges. I.J. at 18. In light of the pending charges, and in expectation that such charges would ultimately be dismissed, Ms.Henry's counsel requested that the Immigration Judge extend the date on which proceedings would be closed. Tr. at 468. The Immigration Judge responded by providing only one additional week and expressly noted that it was unlikely that dispositions for the pending charges would be available by that time. Tr. at 448, 468-69. With the record closed before the resolution of the pending charges, Ms. Henry was denied the opportunity to submit potential positive outcomes to these charges, such as dismissal of the respective complaints. In light of this, Ms. Henry's counsel in its closing statement urged the Immigration Judge to refrain from giving any weight to the pending charges as negative factors in its determination. Closing Statement Before the Immigration Judge at 5-6; I.J. at 18. Notwithstanding this request, the Immigration Judge relied heavily on the pending unproven charges as a basis for making various adverse determinations including (1) that because of the pending charges it was "hard to conclude, with any certainty, that even if Ms. Henry were to remain in the United States, she would remain

with her children." (I.J. Dec. at 17); and (2) as adverse factors indicating lack of rehabilitation (I.J. at 18). This was fundamentally unfair and a violation of Ms. Henry's constitutionally protected right to due process. A[n] LPR's right to due process of law under the Fifth Amendment is well established. *See Brown v. Ashcroft*, 360 F.3d 346, 350-51 (2d Cir. 2004). The core of this due process is having "a meaningful opportunity to be heard.["] *Id.*; *Cf. Blakely v. Washington*, 542 U.S. 296 (2004) (holding in the context of sentencing guidelines that, other than fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).

Ms. Henry testified that she was vigorously defending against the pending charges. Tr. at 435-439; I.J. at 18. The Immigration Judge's decision to close the record, and then use the existence of pending arrests, with no evidence of conviction or corroborating evidence, denied Ms. Henry the opportunity to submit evidence favorable to her with respect to these arrests. The Immigration Judge relied on these pending unproved charges to effectively nullify two positive factors in favor of Ms. Henry's application (i.e. the hardship Ms. Henry's family would suffer and Ms. Henry's rehabilitation). I.J. 17-18. These determinations heavily impacted the Immigration Judge's balancing of factors in his decision to deny Ms. Henry's application for discretionary relief. I.J. at 20. Therefore, the Immigration Judge's closure of the proceeding while charges were pending and subsequent use of

those unproven charges as negative factors constitute a fundamental legal and procedural error that directly prejudiced Ms. Henry.

Moreover, even if it were proper for the Immigration Judge to have considered the pending unproven charges (which Ms. Henry submits it was not), the Immigration Judge erred as a matter of law in giving the pending charges as much weight as it did. The Board has stated that it is "hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein." *Arreguin*, 21 I. & N. at 42. The Immigration Judge's failure to give these pending charges minimal or no weight is therefore in contravention of the Board's own legal standards and should be reversed.

D. The Immigration Judge's Adverse Credibility Determination Is Clearly Erroneous

The Immigration Judge clearly erred in his credibility findings where its determination was based in part on Ms. Henry's testimony regarding her 2003 job application to Cabrini Care at Home. I.J. at 19. The Second Circuit has indicated that an Immigration Judge's adverse credibility finding based upon erroneously stringent standards and not supported by substantial evidence is reversible as a matter of law. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). Moreover, "[i]nconsistencies of less than substantial importance for which a plausible explanation is offered cannot form the sole basis for an adverse credibility find-

ing." *Id.* (citation omitted). Here, the Immigration Judge's credibility determination is based in part on the Immigration Judge's finding that Ms. Henry was not being truthful when she testified that her job application "did not ask her about her criminal record." I.J. at 19. This finding does not comport with the record.

During Ms. Henry's testimony, the Immigration Judge asked very specific questions, namely (1) whether Cabrini was aware of Ms. Henry's criminal record; (2) whether Ms. Henry was asked to provide a criminal record when she sought employment with Cabrini; (3) whether Cabrini asked Ms. Henry if she had ever been "arrested at all"; and (4) whether the Cabrini job application Ms. Henry completed in 1993 asked if Ms. Henry had ever been "arrested." Tr. at 250. Ms. Henry correctly answered each of these questions in the negative. *Id* at 251.

As the Immigration Judge points out in his decision, the Cabrini job application asked only if the applicant had been convicted of a felony or other serious offense (other than a minor traffic violation). I.J. at 10; Ex. 22. Ms. Henry did not contain any questions concerning arrests and it did not require Ms. Henry to provide a criminal record. Ex. 22.

To the extent the Immigration Judge believed that Ms. Henry should have *volunteered* information about her misdemeanor convictions on the Cabrini application because these *might* be considered "serious [offenses]" this was clearly erroneous. *See* I.J. at 10, 19. A person could reasonably believe

that convictions for nonviolent misdemeanors do not constitute "serious offenses" for purposes of a job application. *Compare People v. Rosado*, 556 N.U.S.2d 800, 801 (1990) (noting that petit larceny is a Class A Misdemeanor under New York law and thus not deemed a "serious offense" for purpose of Sixth Amendment right to trial by jury). Thus, Ms. Henry's testimony concerning the Cabrini application is not a sufficient basis to make an adverse credibility finding and, even assuming arguendo that it represents an inconsistency, it is an inconsistency of less than substantial importance for which there is a plausible explanation.

Finally, to the extent that the Immigration Judge's determination of credibility was based on Ms. Henry's insistence of her innocence with respect to certain convictions, this was clearly erroneous. Rather than representing a lack of candor, Ms. Henry's insistence that she is innocent of certain offenses and that she pleaded guilty in order to remain with her children rather than risk incarceration represents truthful testimony. Tr. at 128.

E. The Immigration Judge Clearly Erred in Certain Factual Findings Regarding Ms. Henry's Criminal Record

The Immigration Judge erred in his finding that Ms. Henry's crimes have increased in severity. I.J. at 19. While the record indicates that Ms. Henry pled guilty to burglary in the third degree on September 19, 2003, the record also makes clear that there was no increase in severity of the underlying conduct. Ex. 17.

II. THE IMMIGRATION JUDGE ERRED IN DENYING MS. HENRY'S RELIEF PURSUANT TO INA § 212(h)

Ms. Henry was entitled to and improperly denied discretionary waiver of inadmissibility under INA § 212(h), which allows the Attorney General, in his discretion, to waive various grounds of inadmissibility, including crimes of moral turpitude, where an applicant demonstrates that her removal would result in extreme hardship to a U.S. citizen or lawful resident parent, spouse or child.

An LPR, like Ms. Henry who (i) has resided in the United States continuously for sixteen years before the initiation of proceedings and (ii) has never committed an aggravated felony is eligible for discretionary waiver under INA § 212(h) relief. Ms. Henry, however, claims *direct* eligibility for relief under INA § 212(h) based on her entitlement to equal protection of the laws under the Fifth Amendment to the U.S. Constitution. *Yeung v. INS*, 76 F.3d 337, 341 (11th Cir. 1995).

On its face, § 212(h) distinguishes between non-citizens previously admitted (and not seeking admission), on the one hand, and all other non-citizens seeking admission, including LPRs outside the United States seeking to adjust status, on the other hand. INA § 212(h). Under the language of § 212(h), only the latter category of non-citizens are entitled to apply for discretionary relief. *Id.* Neither § 212(h) nor any other provision of the INA permits a waiver of analogous grounds of deportability. Thus, a non-citizen who is deportable on the same basis as Ms. Henry, but happens to be in the

fortuitous position of applying for admission, whether at a physical border or in an application for adjustment of status, would be entitled to apply for § 212(h) relief. The Immigration Judge's holding was therefore error as a matter of law.

In addition, assuming *arguendo*, that Ms. Henry was eligible, the Immigration Judge held that it would have denied relief on the same grounds as denied under INA § 240A(a). This was erroneous as a matter of law and based on clearly erroneous factual findings.

A. The Immigration Judge Erred in Finding Ms. Henry Ineligible for Relief under INA § 212(h)

The Immigration Judge erred as a matter of law in his denial of INA § 212(h) relief due to his ruling that INA § 212(h) is only available to aliens seeking admission.

There is no rational basis for giving preferential treatment to LPRs who have left the country and are seeking readmission. *Yeung*, 76 F.3d at 341 (11th Cir. 1995); *Francis v. INS*, 532 F.2d at 273 (2d Cir. 1976). In the similar case of disparate treatment of excludable and deportable aliens with regard to their access to discretionary relief under former § 212(c), numerous courts have held that the distinction violates equal protection. *See Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993); *Butris v. INS*, 990 F.2d 1142, 1143 (9th Cir. 1993) (*en banc*) (citing, *inter alia*, *Tapia-Acuna v. INS*, 640 F.2d 223, 224 (9th Cir. 1981)); *Casalena v. INS*,

984 F.2d 105, 106 n.3 (4th Cir. 1993); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993) (citing *Varamparambil v. INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987)); *Campos v. INS*, 961 F.2d 309, 313 (1st Cir. 1992) (citing *Joseph v. INS*, 909 F.2d 605, 606 n.1 (1st Cir. 1990)); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992) (citing, *inter alia*, *Ashby v. INS*, 961 F.2d 555, 557 n.2 (5th Cir. 1992); *Mantell v. INS*, 798 F.2d 124, 125 (5th Cir. 1986), *cert. denied*, 507 U.S. 971 (1993)); *Lozada v. INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988)); *Vissian v. INS*, 548 F.2d 325, 328 n.3 (10th Cir. 1977); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Gutierrez-Perez v. Fasano*, 37 F. Supp. 2d 1166 (S.D. Cal. 1999).

B. The Immigration Judge, Assuming *Arguendo* Eligibility, Erred in Denying Ms. Henry's Application for INA § 212(h) Relief

It was legally and factually erroneous for the Immigration Judge to rule that, assuming *arguendo* that Ms. Henry was eligible, INA § 212(h) relief would be denied "as a matter of discretion for the reasons indicated" in its decision on the Cancellation of Removal application. I.J. at 20.

Though the Immigration Judge recognized that "Ms. Henry's removal would cause severe emotional and economic hardship to the Respondent's family" (I.J. at 17), the Immigration Judge made a legal error in not using, as a threshold matter, the standard of "extreme hardship" to her qualifying

relatives to determine her eligibility for 212(h) relief. INA § 212(h); 8 U.S.C. § 1182(h).

Further, the Immigration Judge erred as a matter of law in summarily denying the application as a matter of discretion for the same reasons as its denial of Ms. Henry's application for cancellation of removal. Ms. Henry submits that *In re Jose Mendoza-Moralez*, 21 I. & N. Dec. 296, 299 (BIA 1996) was wrongly decided and should be overturned. The plain language of the Section 212(h) does not require a balancing of factors required by Cancellation of Removal. "'It is a well established rule of statutory construction that, in cases in which Congress includes particular language in one section of a statute but omits that language in another . . . , a presumption arises that the disparate inclusion and exclusion was intentional and purposeful.'" *Id.* At 308. "In a Section 212(h)(1)(B) case, the statutory emphasis is on the existence of specified close family members and a showing of extreme hardship to those family members." *Mendoza-Moralez*, 21 I. & N. Dec. at 309 (dissenting opinion). Ms. Henry has demonstrated the requisite hardship and should [be] granted Section 212(h) relief on this basis. "[B]y importing without distinction the established discretionary factors applicable in [cancellation of removal] adjudication . . . into a section 212(h) adjudication," the Immigration Judge "has skewed the basis for a reasonable adjudication consistent with the governing statutory section and the fair exercise of discretion." *Id* at 310.

Moreover, by failing to strictly construe the statutory requirements for 212(h) relief, the Immigration Judge violated Ms. Henry's constitutionally protected right to due process. *See Boutilier v. INS*, 363 F.2d 488, 495 (2d Cir. 1966) (applying to review of deportation proceedings principle that legislation must be sufficiently precise to afford adequate notice of the standards by which the individuals affected are required to guide themselves); *Francis v. INS*, 532 F.2d at 272 (noting that in enforcement of immigration policies, the Executive Branch of the Government must respect the procedural safeguards of due process).

Even if the Immigration Judge properly applied the same reasoning applied to his cancellation of removal determination (which Ms. Henry submits is not the case), it erred in the exercise of its discretion by failing to give appropriate weight to the extreme hardship Ms. Henry's family (five minor U.S. citizen children, a U.S. citizen mother, LPR father and LPR and U.S. citizen siblings and grandfather) would suffer in the event she is deported. Ex. 9.

CONCLUSION

For the reasons stated above, the Board should reverse the Immigration Judge's decision, and grant Ms. Henry the relief she is seeking. In the alternative, the Board should remand the case for further proceedings.

Dated: New York, New York
September 21, 2006

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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01 Civ. 3377 (DC)

Decided November 30, 2001

Filed December 3, 2001

JENNY LEE HENRY,

Petitioner,

against

JOHN ASHCROFT, *et al.*,

Respondents.

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JUDGES: DENNY CHIN, United States District Judge

OPINION

CHIN, D.J.

Petitioner Jenny Lee Henry seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, vacating her order of removal and declaring her eligible to apply for a cancellation of removal pursuant to § 240A of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1229b, and a waiver of removal pursuant to INA § 212(h), 8 U.S.C. § 1182(h).

This case presents an issue of apparent first impression: whether a provision of a statute enacted in 1996 limiting an alien's ability to seek relief from an order of removal can be applied, retroactively, to a crime committed more than seven years before the statute took effect, where the removal proceedings were not commenced until several years after the statute took effect. I hold that the application of the provision to a crime committed before the law was passed, where removal proceedings were not commenced until after the law took effect, would violate the ex post facto clause of Art. I, Sect. 9, Cl. 3 of the Constitution. Accordingly, the petition is granted.

BACKGROUND

I. *Statutory Background*

Pursuant to INA § 237, an alien who has been convicted of two crimes of moral turpitude not arising out of a single scheme of criminal conduct is subject to removal. *See* 8 U.S.C. § 1227(a)(2)(A)(ii). Petit larceny historically has been considered a crime involving moral turpitude. *See Brett v. INS*, 386 F.2d 439, 439 (2d Cir. 1967), *cert. denied*, 392 U.S. 935 (1968); *United States ex rel. Ventura v. Shaughnessy*, 219 F.2d 249, 251 (2d Cir. 1955).

Prior to 1996, certain lawful permanent residents ("LPRs") otherwise determined to be deportable were entitled to apply to the Attorney General for a waiver of deportation under INA § 212(c).[1] *See* 8 U.S.C. § 1182(c) (1990). To qualify for a waiver under INA § 212(c), an alien had to have seven continuous years of lawful residence in the United States. *See id.*

On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which "altered many aspects of the immigration laws, including the eligibility requirements for discretionary relief from deportation." *Rojas-Reyes v. INS*, 235 F.3d 115, 120 (2d Cir. 2000). "Removal" proceedings replaced what had previously been called "deportation" and "exclusion" proceedings. *Id.* (citing IIRIRA § 304(a)(3),

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[1] The discretionary relief available under INA § 212(c) applied to aliens seeking a waiver in exclusion proceedings as well as aliens seeking a waiver in deportation proceedings. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

codified at 8 U.S.C. § 1229a). Relief from deportation—"suspension of deportation"—was replaced with a new form of relief, called "cancellation of removal." *Id.* (citing IIRIRA § 304(a)(3), *codified at* 8 U.S.C. § 1229b).

To qualify for a cancellation of removal under IIRIRA, an alien must establish seven continuous years of residence in the United States, just as under the repealed INA § 212(c). *See* INA § 240A (a)(2), 8 U.S.C. § 1229b(a)(2). IIRIRA, however, also added a "clock stopping" provision that had not existed with respect to INA § 212(c). *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp. 2001). The clock stopping provision provides:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) *when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.*

Id. (emphasis added). In other words, under this provision, an alien's accrual of a period of continuous residence stops when she is served with a

notice to appear or when she commits an included offense.

II. *Facts*

Petitioner, a native of Guyana, entered the United States as an LPR on November 11, 1984. (Gov. Return, Ex. A at 72). Petitioner has at least three convictions for petit larceny,[2] the first dated October 5, 1987. (Gov. Return, Ex. A at 85). Her most recent convictions, based on guilty pleas, occurred on January 10 and March 14, 2000. (Gov. Return, Ex. A at 103, 105). As a result of these convictions, as she concedes, petitioner is subject to removal.

Petitioner has not traveled abroad since her arrival in the United States on November 11, 1984. (Gov. Return, Ex. A at 227). Petitioner has five children, all born in the United States, ranging in age from three to eleven years old. (Gov. Return, Ex. A at 238-42).

III. *Procedural History*

On May 24, 2000, the Immigration and Naturalization Service ("INS") commenced removal proceedings against petitioner by serving her with a notice to appear. (Gov. Return, Ex. A at 258). Petitioner responded by filing a timely application for

[2] Petitioner has approximately 20 convictions for petit larceny since October 5, 1987. (Gov. Return, Ex. A at 82-107). Her repeated criminal conduct may factor into the consideration of her application for a discretionary waiver on remand. For purposes of this writ, however, only the October 5, 1987 conviction is relevant in deciding whether the clock stopping provision has an improper retroactive effect.

cancellation of removal pursuant to INA § 240A. (Gov. Return, Ex. A at 226-32); *see* 8 U.S.C. § 1229b. Immigration Judge John A. Duck, Jr. (the "IJ") "pretermitted" her application for cancellation based upon his finding that petitioner failed to satisfy the continuous residence requirement under INA § 240A(a)(2). (Gov. Return, Ex. A at 73); *see* 8 U.S.C. § 1229b(a)(2). In declaring petitioner ineligible for cancellation of removal, the IJ relied on the interpretation of the clock stopping provision in *In re Perez*, Int. Dec. 3389, No. A91 875 147, 1999 WL 293944 (BIA May 12, 1999).[3] Petitioner filed an appeal and in March 2001, the Board of Immigration Appeals (the "BIA") affirmed the IJ's denial of petitioner's application for cancellation of removal. (Gov. Return, Ex. A at 22).

On December 12, 2000, the IJ ordered petitioner removed from the United States to Guyana. (Gov. Return, Ex. A at 51-2). Petitioner filed this writ of habeas corpus on April 20, 2001. Three days later, petitioner filed with the BIA a motion to reconsider the removal order. (Gov. Return, Ex. A at 8-9). In May 2001, the BIA denied her motion to reconsider. (Gov. Return, Ex. A at 2-3).

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[3] In *Perez*, the Board of Immigration Appeals (the "BIA") held that an alien ceases to accrue time towards the seven year continuous residence requirement on the date the crime was committed, not the date the alien was convicted, even if the crime was committed before IIRIRA was enacted. *Perez*, 1999 WL 293944, at section V.

DISCUSSION

Petitioner seeks habeas relief on the following grounds: (1) the clock stopping provision in INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1), was given an improper retroactive effect in her case; and (2) she was denied equal protection of the laws because INA § 212(h), 8 U.S.C. § 1182(h), improperly distinguishes between similarly situated classes of aliens: LPRs with two convictions for crimes of moral turpitude who have traveled outside of the country and LPRs with two convictions for crimes of moral turpitude who have not traveled outside of the United States.

I. *Retroactive Application of the Clock Stopping Provision*

Petitioner entered the United States as an LPR on November 11, 1984, and she was convicted of petit larceny for the first time on October 5, 1987. If the clock stopping provision applies to her October 5, 1987 conviction, then she is not eligible for cancellation of removal, as the two years and eleven months between her entry and first conviction would fall far short of the seven year requirement. If the clock stopping provision is not applicable—and the immigration laws in effect at that time contained no clock stopping provision—then petitioner satisfied the seven years residence requirement by November 1991, long before she committed the crimes for which she was convicted in January and March of 2000. Hence, if the clock stopping provision does not apply, then petitioner

was eligible for a discretionary waiver of deportation after November 1991. The issue, thus, is whether the clock stopping provision, enacted in 1996, applies to petitioner's October 5, 1987 conviction, effectively stripping her of eligibility for a discretionary waiver.

In her petition for habeas relief, petitioner argues that application of the clock stopping provision to her October 1987 conviction would result in the law being given impermissible retroactive effect. Therefore, she argues, the clock stopping provision should not be construed to preclude her from seeking a waiver of deportation under former INA § 212(c). Respondents argue that Congress clearly intended for the clock stopping provision to apply retroactively and that there is no impermissible retroactive effect because petitioner was subject to deportation before she accrued the necessary seven years of continuous residence.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court reiterated the longstanding principle that laws generally should not be given retroactive effect. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265. At the same time, the Court acknowledged the "apparent tension" between the axiom that "'[r]etroactivity is not favored'" and the rule that "'a court is to apply the law in effect at the time it renders its decision.'" *Id.* at 264 (*quoting Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988));

see Yesil v. Reno, 973 F. Supp. 372, 378 (S.D.N.Y. 1997).

Landgraf and other Supreme Court decisions establish a two-step analysis for determining whether a statute has retroactive effect. First, the court "is to determine whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280. If so, the inquiry need proceed no further and the court need not "resort to judicial default rules." *Id.*

Second, if "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Id.* The court does so by "ask[ing] whether the new provision attaches new legal consequences to events completed before its enactment," *id.* at 269-70, and by examining "whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. As courts make this inquiry, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* at 270. If the statute would operate "retroactively" under this analysis, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* at 280.

The Court in *Landgraf* also emphasized that "application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. Indeed, when the new statute "authorizes or affects the propriety of prospective

relief," its application is "not retroactive." *Id.* Likewise, statutes "conferring or ousting jurisdiction" that "'speak to the power of the court rather than to the rights or obligations of the parties'" generally do not raise concerns about retroactivity. *Id.* at 274 (*quoting Republic Nat'l, Bank of Miami v. United States*, 506 U.S. 80, 99 (1992) (Thomas, J., concurring)). Finally, "[c]hanges in procedural rules may often be applied in suits arising before their enactment" without violating the principle against retroactivity. *Id.* at 275. In reviewing these permissible retroactive applications of new laws, however, the Supreme Court reaffirmed "the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Id.* at 278.

The Supreme Court has recently applied the *Landgraf* analysis to similar changes in the immigration laws made by IIRIRA. *See INS v. St. Cyr*, 121 S. Ct. 2271 (2001). Pursuant to INA § 240A(a)(3), enacted by IIRIRA, any alien who has been convicted of an aggravated felony is ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3). In *St. Cyr*, the Supreme Court held that applying INA § 240A(a)(3) to aliens who had pled guilty to aggravated felonies before the enactment of IIRIRA would have an improper retroactive effect because it "clearly 'attaches a new disability, in respect to transactions or considerations already past.'" *St. Cyr*, 121 S. Ct. at 2291 (*quoting Landgraf*, 511 U.S. at 269).

For the reasons set forth below, I hold that the clock stopping provision does not apply to crimes

committed before IIRIRA was signed into law, where removal proceedings are not commenced until after IIRIRA's effective date. First, the statute itself does not clearly indicate whether Congress intended for it to apply retroactively in these circumstances. Second, under the "judicial default" rules, the clock stopping provision would have an improper retroactive effect because it attaches new legal consequences to completed events and disrupts the settled expectations of long-time LPRs.

A. *Congressional Intent*

INA § 240A(d)(1) contains no language addressing its applicability to orders to show cause issued or crimes committed before its enactment. *See* 8 U.S.C. § 1229b(d)(1). Congress, however, addressed certain aspects of the retroactivity of INA § 240A(d)(1) in § 309(c)(5) of IIRIRA, which is entitled "Transitional Rules with Regard to Suspension of Deportation." Section 309(c)(5) provides that, in deportation cases pending when IIRIRA took effect, the clock stopping provision applies to "orders to show cause issued before, on, or after the date of the enactment of [IIRIRA]." Pub. L. No. 104-208, 110 Stat. 3009 (1996).

IIRIRA "generally applies only to proceedings initiated on or after the statute's effective date of April 1, 1997." *Rojas-Reyes*, 235 F.3d 115. In *Rojas-Reyes*, however, the Second Circuit noted that § 309(c)(5) "applies the stop-time provision to suspension applications submitted in *deportation pro-*

ceedings under prior law." *Id.* (emphasis added). Hence, the Second Circuit was of the view that the transitional rules applied to cases actually pending when IIRIRA took effect, that is, deportation proceedings commenced under prior law.

The Second Circuit also noted that when 309(c)(5) was enacted, it referred to "notices to appear" rather than "orders to show cause." "Notices to appear" are used to commence deportation proceedings initiated on or after IIRIRA's effective date; in contrast, prior to the enactment of IIRIRA, deportation proceedings were commenced by service of a charging document called an "order to show cause." *Id.* Hence, the use of "notices to appear" in reference to deportation proceedings under prior law was confusing. Congress sought to eliminate the confusion by passing yet another statute, the Nicaraguan Adjustment and Central American Relief Act of 1997 (the "NACARA"), Pub. L. No, 105-100, Title II, 111 Stat. 2160, 2193-201 (Nov. 19, 1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997). The NACARA replaced the words, "notice to appear" with the pre-IIRIRA phrase "order to show cause." *See Rojas-Reyes*, 235 F.3d at 120-21.

What this change in statutory language shows is that Congress intended "to apply the stop-time rule to all requests for suspension of deportation *pending* on April 1, 1997." *Rojas-Reyes*, 235 F.3d at 121 (emphasis added). In *Rojas-Reyes*, INS had commenced deportation proceedings against the alien in 1993 and the proceedings were pending when IIRIRA took effect. Hence, the petitioner fell

squarely within the scope of § 309(c)(5), and the Second Circuit held that the retroactive application of the clock stopping rule to Rojas-Reyes was constitutional.

Section 309(c)(5) does not apply to this case, however, for the transitional rules apply only to pending deportation cases. Petitioner was not in exclusion or deportation proceedings on IIRIRA's effective date, and she was never served with an "order to show cause." Rather, "cancellation proceedings" were brought against her on May 24, 2000, well after IIRIRA's effective date, when INS served her with a "notice to appear."

Consequently, nothing in § 309(c)(5) or any of the other transitional rules or in the clock stopping provision itself addresses the situation of retroactive application of the clock stopping provision to cancellations proceedings commenced after the effective date of IIRIRA where the criminal conduct was committed before IIRIRA was passed. Congress was silent in this respect. Section 309(c)(5) shows, however, that when Congress wanted the clock stopping provision to apply retroactively to a limited category of cases—deportation cases pending when IIRIRA took effect—it said so clearly. If Congress had intended for the clock stopping provision to apply to crimes committed before the law was passed where removal proceedings had not yet been commenced, Congress could have so provided. It did not. At a minimum, then, the statute is unclear as to Congress's intent with respect to retroactive application of the clock stopping provision to crimes committed before IIRIRA's effective

date where cancellation proceedings were not commenced until after IIRIRA took effect.

This result may seem counterintuitive; logic would suggest that if the clock-stopping provision applies to crimes committed before IIRIRA was passed where deportation proceedings were pending, it should apply as well to crimes committed before IIRIRA was passed where cancellation proceedings were not commenced until later. But the fact is that Congress did not specifically address the category of cases before the Court.

IIRIRA was enacted just two years after the Supreme Court decided *Landgraf*. Congress presumably was well aware of the teachings of *Landgraf*—including its admonition that Congress should be explicit when it intended a new law to apply retroactively—when it elected not to include explicit language making the clock stopping provision applicable to crimes committed prior to the effective date of IIRIRA where cancellation proceedings were not commenced until later.

Congress's intent in enacting the transitional rules is also instructive. In enacting § 309(c)(5), Congress specifically sought to prevent aliens from purposefully delaying their deportation proceedings until they had accrued the seven years of continuous residence required for eligibility. H.R. Rep. No. 104-879, at 108 (1997). This purpose would not be furthered by interpreting the retroactive language of § 309(c)(5) to apply to cases such as the case here, where the seven years had already accrued long before the effective date of IIRIRA and no INS proceedings were pending at that time.

There were no proceedings against petitioner that could be delayed when IIRIRA was passed.

In sum, the text of IIRIRA and the legislative history demonstrate that Congress did not clearly intend for the clock stopping provision to apply retroactively to crimes committed before its effective date, where removal proceedings had not yet been commenced by IIRIRA's effective date.

B. *Improper Retroactive Effect*

The clock stopping provision, as applied by the IJ in petitioner's case, has an improper retroactive effect. It attaches new legal consequences to events completed before its enactment, and it impairs important rights possessed by petitioner at the time she acted and significantly increases her liability for that past conduct.

The availability of relief from deportation—even the possibility thereof—is a critical factor to an alien who is considering whether to enter into a guilty plea. *See United States v. Del Rosario*, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring) ("The possibility of being deported can be—and frequently is—the most important factor in a criminal defendant's decision how to plead."), *cert. denied*, 498 U.S. 942 (1990); *Mojica v. Reno*, 970 F. Supp. 130, 175 (E.D.N.Y. 1997) ("For a non-citizen, the choice to forego trial and plead guilty is often critically dependent on information regarding possible immigration consequences."), *aff'd in part, dismissed in part, Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998). An alien who decided to plead guilty to

a crime that rendered her deportable might very well have done so with the expectation that if she rehabilitated herself and showed that she was deserving of a second chance, she would have the opportunity to seek relief from deportation by way of a § 212(c) application. On the other hand, if she had known that there was no possibility of relief from deportation, if she had known that it was a certainty that she would be banished from this country and separated from her five children, she might very well have come to a different conclusion.[4] *See Mojica*, 970 F. Supp. at 176 ("The importance of immigration consequences of pleas in criminal cases cannot be underestimated. Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently

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[4] The Government correctly points out that the statute stops accrual of continuous residence upon an alien's commission of a crime, and not upon an alien's conviction of a crime. *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp. 2001). The Court is meant to infer from this distinction that petitioner, in all likelihood, did not rely on her continued eligibility for a discretionary waiver of deportation when she committed petit larceny on October 5, 1987. Thus, the Government suggests, she has not been deprived of any settled expectation through the retroactive application of the clock stopping provision. The Government's argument is unavailing, though, because petitioner was eligible for discretionary relief before IIRIRA was enacted in 1996. Regardless of whether she relied on her eligibility, it is the retroactive denial of an already accrued eligibility for discretionary relief that gives the clock stopping provision its impermissible retroactive effect.

separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea.").

A right to discretionary relief is a substantive right, and the elimination of even the possibility of obtaining relief thus has a retroactive effect. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) (indicating that a statute taking away parole eligibility for offenses for which parole was available under the law in existence at the time the offenses were committed could be found to be constitutionally impermissible as an ex post facto law).

Prior to the enactment of the clock stopping provision, the seven years of continuous lawful residence required for an INA § 212(c) waiver did not end until a deportation order became administratively final. *See Lok v. INS*, 681 F.2d 107 (2d Cir. 1982). Hence, under the immigration laws in effect prior to IIRIRA, petitioner did not become statutorily ineligible for INA § 212(c) relief when she entered a guilty plea to petit larceny on October 5, 1987. After petitioner accrued seven continuous years of lawful residence, she had a reasonable expectation that INA § 212(c) relief was available to her. It is an impermissible retroactive application of the clock stopping provision to strip petitioner of that reasonable expectation.

C. *Deference*

Courts owe deference to administrative tribunals in their interpretations of statutes that they are charged with implementing. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). When an administrative agency's interpretation is unreasonable, however, a court is not constrained by the deference principle. *See Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000), *cert. denied*, 531 U.S. 1081 (2001). Because the clock stopping provision has an impermissible effect when applied retroactively, the BIA's interpretation of it in *Perez* is unreasonable and deference is not owed to it.

CONCLUSION

Absent clear intent from Congress that the clock stopping provision applies retroactively to cancellation proceedings commenced after the effective date of IIRIRA where the crime was committed before the statute became law, and considering the unfairness that would result from applying the clock stopping provision retroactively in the circumstances of this case, I hold that petitioner is eligible to apply for cancellation of removal pursuant to INA § 240A, 8 U.S.C. § 1229b. Accordingly, this case is remanded to the INS for consideration of petitioner's application for cancellation of removal and other proceedings not inconsistent with this decision.

As to petitioner's equal protection claim, I do not reach it. The Government states that petitioner was not barred from applying for a discretionary waiver pursuant to INA § 212(h), 8 U.S.C. § 1182(h), but notes that she never submitted such an application. The Government thus argues that petitioner failed to exhaust her administrative remedies in this respect. As the case is being remanded in any event, on remand petitioner may submit an application pursuant to § 212(h) as well.

The Clerk of the Court shall enter judgment granting the petition and remanding the case to INS to permit petitioner to file applications for cancellation of removal pursuant to INA § 240A and a waiver of removal pursuant to INA § 212(h). The Clerk of the Court shall close this case, but the Court retains jurisdiction in the event further proceedings in this Court become necessary.

SO ORDERED.

Dated: New York, New York
November 30, 2001

/s/ DENNY CHIN
DENNY CHIN
United States District Judge

DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

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17 I. & N. Dec. 218
Interim Decision: 2751

Decided by Board January 15, 1980

Matter of Sanchez

In Deportation Proceedings

No. A-14273169

CHARGE: Order: Act of 1952—Sec. 241(a)(4) [8 U.S.C. 1251(a)(4)]—Convicted of crime involving moral turpitude within 5 years after entry, and sentenced to confinement therefor for 1 year or more—to wit mail fraud

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APPEARANCES: ON BEHALF OF RESPONDENT: Timothy S. Barker, Esquire, Legal Aid Society of San Diego, Inc., Chula Vista, California

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Before:

MILHOLLAN, *Chairman*;
MANIATIS, APPLEMAN, MAGUIRE, and FARB,
Board Members

OPINION

In a decision dated February 17, 1978, an immigration judge found the respondent deportable as charged, and denied his applications for relief from deportation under sections 212(c), 212(h), and 245 of the Immigration and Nationality Act, 8 U.S.C. 1182(c), 1182(h) and 1255. The respondent appealed. The record will be remanded.

The respondent, a 29-year-old native and citizen of Mexico, entered the United States as a lawful permanent resident on April 14, 1965. He resided in the United States, attending school and living with family friends, until 1970. In 1970, the respondent obtained employment with a brokerage firm in San Ysidro, California. Unable at this time to maintain a residence in the United States for economic reasons, the respondent moved back to Mexico, where he could live with his parents rent-free. The respondent had on September 19, 1967, executed a commuter questionnaire (SW-426), and his alien registration receipt card (Form I-151) was modified to designate him as a commuter. The respondent maintained a commuter status from 1970 to 1976, entering the United States each day for work, and recrossing back to Mexico in the evenings. In September of 1976, the respondent, with his family, began residing in the United States.

On October 27, 1976, after a brief visit to Mexico, the respondent was arrested at the San Ysidro border, and charged with mail fraud under 18 U.S.C. 1341. The respondent was taken into custody, detained overnight, and released the next day

pending his trial on the mail fraud charges. The respondent pleaded guilty to these charges on July 18, 1977, and he was sentenced to confinement for 1 year and 1 day. This sentence was suspended. Deportation proceedings were initiated against the respondent on September 21, 1977, when an Order to Show Cause was issued against him.

At a deportation hearing begun in October of 1977, and completed in February of 1978, the respondent was found deportable under section 241(a)(4) of the Act, 8 U.S.C. 1251(a)(4), as an alien convicted of a crime involving moral turpitude within 5 years of entry, and sentenced to confinement therefor for a year or more. All applications for discretionary relief were denied by the immigration judge.

On appeal, the respondent makes several arguments. To begin with, he contends that the immigration judge's finding of deportability was incorrect, because there had been no conviction of a crime involving moral turpitude within 5 years of his entry as a lawful permanent resident. He then argues that he is eligible for a waiver under section 212(c) of the Act because of his alleged 7 years of continuous domicile in the United States, that he is eligible for a 212(h) waiver, as that relief "should be available in a deportation hearing," and that he is eligible for adjustment of status under section 245 of the Act. Finally, the respondent argues that he should properly have been placed in exclusion proceedings, rather than in deportation proceedings, "since he had not effected an 'entry' into the

United States." We will consider these arguments separately.

The immigration judge's finding of deportability was correct. Section 241(a)(4), under which the respondent was charged, and found deportable, provides for the deportation of "any alien" who is "convicted of a crime involving moral turpitude committed within 5 years after entry." The statute does not specify that the crime must have been committed within 5 years of a lawful permanent resident's original entry as an immigrant. A crime committed within 5 years of any entry made by an alien can form the basis for deportation under section 241(a)(4). *See Steinsvik v. INS*, 603 F.2d 225 (9 Cir. 1979). In the present case, the respondent's mail fraud began on an unknown date, and continued to July 1976 (*see* Ex. 3). From 1970 to September of 1976, the respondent held the status of commuter, and as such made an "entry" into the United States nearly every day. *Matter of Rico*, 16 I. & N. Dec. 181 (BIA 1977); *Matter of Diaz*, 15 I. & N. Dec. 488 (BIA 1975); *Matter of Hoffman-Arvayo*, 13 I. & N. Dec. 750 (BIA 1971). Hence, there can be no question that the respondent committed the crime of mail fraud within 5 years of an entry into the United States. As he was sentenced to imprisonment for a year or more for this crime, he is deportable under section 241(a)(4). The fact that the respondent's sentence was suspended does not change this result. *Matter of M---*, 6 I. & N. Dec. 346 (BIA 1954). *See also Matter of De la Cruz*, 15 I. & N. Dec. 616 (BIA 1976).

We also agree with the immigration judge that the respondent was properly in deportation proceedings, rather than exclusion proceedings. The respondent's contention that he has made no "entry" since his conviction, so as to be amenable to a deportation hearing, is wholly without merit. It is true that an alien makes an "entry" for immigration purposes only when he comes into the United States "free from actual or constructive restraint." *Matter of Yam*, 16 I. & N. Dec. 535 (BIA 1978). *See also U.S. ex rel. Lam Fo Sang v. Esperdy*, 210 F.Supp. 786 (S.D.N.Y. 1962); *Matter of V--- Q---*, 9 I. & N. Dec. 78 (BIA 1960). Here, the respondent came into the United States on October 27, 1976, under custody, and so no entry was made at that time. However, when he was released the following day without bond, and only on the condition that he appear for his trial on the mail fraud charges, an entry was made. He was then free from any legal restraints imposed upon him by the immigration laws. *See Matter of V--- Q---, supra*. Moreover, the respondent testified that he made many brief trips to Mexico after he was apprehended in October of 1976, as well as after his conviction in July 1977. See transcript at 41-42. He reentered the United States and was inspected after each of his departures to Mexico. Given these undisputed facts, no serious claim can be made that the respondent should be in exclusion proceedings.

With regard to the respondent's application for discretionary relief under section 212(c) of the Act, we find, as did the immigration judge, that the respondent is ineligible for this waiver. Section

212(c) provides for a waiver of certain grounds of excludability for lawful permanent residents who temporarily proceed abroad voluntarily, and not under an order of deportation, and who are returning to a "lawful unrelinquished domicile of 7 consecutive years." The respondent argues that he satisfies the 7 years' domicile requirement because he never really abandoned his United States domicile during the years he was a commuter. We cannot agree.

The word "domicile" in section 212(c) refers to the legal concept of being a domiciliary of the United States. *See Matter of Garcia-Quintero*, 15 I. & N. Dec. 244 (BIA 1975). Thus, in order for an alien to establish "domicile" in the United States, he must be physically present here and have the intention of making the United States his home for the indefinite future. *Gilbert v. David*, 235 U.S. 561, 569-570 (1915). Once a domicile is acquired, it is retained until such time as a domicile is established elsewhere. *Garner v. Pearson*, 374 F.Supp. 580, 590 (M.D. Fla. 1973). The fact that an alien has the status of an immigrant lawfully admitted for permanent residence does not necessarily mean that he intends to reside here permanently. *Saxbe v. Bustos*, 419 U.S. 65 (1974). *See Matter of Carrasco*, 16 I. & N. Dec. 195 (BIA 1977), *aff'd. sub nom. Carrasco-Favela v. INS*, 563 F.2d 1220 (5 Cir. 1977).

The question presented is one of fact: did the respondent from 1970 to 1976 either have the intention to make his home in Mexico for the indefinite future, or lack an intention to make his home

elsewhere? *Gilbert v. David, supra; Matter of Carrasco, supra.* The respondent moved to Mexico in 1970 for economic reasons. He stated at his hearing that he and his family intended to move back to the United States when his youngest sister finished primary school, so that she could attend junior high school in this country (Tr. at 28). It is argued that the respondent "only left the United States for a temporary period of time, a fixed period of time," such period to end when his sister became eligible to begin secondary school in the United States (Tr. at 33). The respondent contends that this fact, coupled with the facts that he spent much time in the United States during these years, had most of his friends here, paid taxes here, maintained a California driver's license, and registered for the Selective Service here, warrant a finding that the respondent's United States domicile, for 212(c) purposes, was not abandoned in 1970. The fact remains, however, that for 6 years the respondent lived with his family in Mexico, and that he had no actual home in the United States to which to return during this time. From these facts we can only conclude that the respondent's stay in Mexico from 1970 to 1976 was far from temporary in nature, and that it precludes a finding of 7 years' lawful unrelinquished domicile under section 212(c).

Although we find the respondent ineligible for a 212(c) waiver, we believe that he may be eligible for a waiver under section 212(h). 1 That section provides that:

> Any alien, who is excludable from the United States under paragraphs (9), (10), or (12) of this section, who (A) is the spouse or child, including a minor unmarried adopted child, of a United States citizen or an alien lawfully admitted for permanent residence, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence (1) if it shall be established to the satisfaction of the Attorney General that (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawful resident spouse, parent, or son or daughter of such alien, and (B) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States; and (2) if the Attorney General, in his discretion, and pursuant to such terms, conditions, and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa and for admission to the United States.

This Board has held that relief under section 212(h) and its predecessors (Section 5 of the September 11, 1957 Act, and the prior 212(g) may be granted nunc pro tunc in deportation proceedings in order to cure a ground of inadmissibility at the time of entry. *Matter of Millard*, 11 I. & N. Dec. 175 (BIA 1965); *Matter of P---*, 7 I. & N. Dec. 713 (BIA 1958). *See also Matter of Bernabella*, 13 I. & N. Dec. 42 (BIA 1968); *Matter of Mascorro-Perales*, 12 I. & N. Dec. 229 (BIA 1967). The immigration judge in his

decision attempts to distinguish *Matter of P---*, *supra*, on the ground that in that case the respondent was inadmissible at the time of his original entry as a lawful permanent resident, and he was subsequently charged under section 241(a)(1) of the Act as an alien excludable at entry. In the present case, the respondent did not become excludable until long after his entry as an immigrant, and he was charged with deportability under section 241(a)(4).

Section 212(a) of the Act provides for the exclusion of any alien, at any time, if he fits into an excludable class. Aliens who become inadmissible after an original lawful entry may later be excluded from the United States if they depart and seek to reenter, and they may also at such later date be eligible for various waivers of excludability. Hence, the fact that the respondent was not3 inadmissible at the time of his original entry does not bar him from seeking 212(h) relief. Nor do we believe that the fact that an alien is charged under section 241(a)(4), rather than under 241(a)(1) with an underlying basis of 212(a)(9), should prevent that alien from qualifying for a waiver under section 212(h). In an analogous case involving the 212(c) waiver, we held that, "a waiver of the ground of inadmissibility may be granted in a deportation proceeding when, at the time of the alien's last entry, he was inadmissible *because of the same facts which form the basis of his deportability*." *Matter of Tanori*, 15 I. & N. Dec. 566 (BIA 1976). (Emphasis added.) In *Tanori*, the alien was charged with deportability under section 241(a)(11)

of the Act (not under section 241(a)(1) with an underlying basis of 212(a)(23)), yet he was found eligible for a nunc pro tunc waiver under section 212(c). Similarly, we believe that the respondent in this case should not be precluded from obtaining a waiver under 212(h) due to the technical fact that he was charged under section 241(a)(4) rather than under 241(a)(1).

The respondent is the father of a United States citizen child, 4 born on April 6, 1977. He has departed the United States and reentered on numerous occasions since the birth of this child. Consequently, authority for a waiver under section 212(h) existed at the time of these subsequent entries if the respondent's daughter qualifies as his child under the immigration laws. *Compare Matter of Bernabella, supra*. In order for a child to qualify as the "child" of his father for immigration purposes, that child must be either legitimate at birth, or legitimated prior to the age of 18 under the law of the child's residence or domicile, or under the law of the father's residence or domicile. Section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1). As the respondent's daughter was born out of wedlock, and the respondent has never married the child's mother, the child cannot qualify as the legitimate child of the respondent. However, according to the respondent's testimony, his daughter lives with him and his parents in California (Tr. at 24, 26, 34). Under California law, legitimation of a child can be accomplished by methods other than the marriage of the child's natural parents. *See Matter of Buenaventura*, 16 I. & N. Dec. 456 (BIA 1978).

The respondent's testimony indicates that his daughter may have been legitimated under the applicable law (Tr. at 34), but the issue of the child's possible legitimation was not raised at the hearing. On remand, therefore, the respondent should be given an opportunity to establish that his daughter has been legitimated and that she therefore qualifies as his child under the immigration laws. If he can make such a showing, then he will have established *prima facie* eligibility for a section 212(h) waiver.

The respondent has been a permanent resident alien for over 14 years. He has close family ties in the United States, including his lawful permanent resident mother and his United States citizen sisters, as well as his citizen daughter. Following his conviction for mail fraud, the respondent's sentence was suspended. He has been working full-time, making restitution payments, and meeting regularly with his probation officer since the time of his conviction. The record contains no evidence of misconduct apart from the aforementioned conviction. Given these facts, we believe that the respondent may merit a nunc pro tunc waiver under section 212(h). On remand (assuming legitimation6 of the child is established), the immigration judge should consider any evidence of hardship which may be presented by the respondent, so that a decision as to whether the respondent merits this waiver as a matter of discretion may be made.

As our decision with regard to the 212(h) application disposes of this case, we need not reach the

issue of the respondent's application for adjustment of status under section 245 of the Act.

ORDER: The record is remanded to the immigration judge for further proceedings consistent with this opinion, and for the entry of a new decision.

DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

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17 I. & N. Dec. 608
Interim Decision: 2845

Decided by Board December 23, 1980

Matter of Parodi

In Deportation Proceedings

No. A-31326731

CHARGE: Act of 1952—Sec. 241(a)(4) [8 U.S.C. 1251(a)(4)]—Convicted of crime involving moral turpitude committed within 5 years after entry, and sentenced to confinement for a year or more, to wit: passing counterfeit $20 Federal Reserve notes

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APPEARANCES: ON BEHALF OF RESPONDENT: Virgil W. Mungy, Esquire, Chicago, Illinois

ON BEHALF OF SERVICE: Samuel Der-Yeghiayan, Trial Attorney

Before:

MILHOLLAN, *Chairman*;
MANIATIS, APPLEMAN, and MAGUIRE,
Board Members

OPINION

In a decision dated March 13, 1980, an immigration judge found the respondent deportable under section 241(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(4), as an alien who, within 5 years of entry, was convicted of a crime involving moral turpitude, and sentenced to confinement therefor for a year or more. An application for voluntary departure was denied. The appeal will be dismissed.

The respondent is a 30-year-old native and citizen of Ecuador who entered the United States on March 19, 1974, as a lawful permanent resident. On August 2, 1977, he was convicted in United States District Court for the Southern District of Illinois, for the offense of passing counterfeit $20 Federal Reserve notes, in violation of 18 U.S.C. 472. He was sentenced to 6 years imprisonment for this crime, and served over 2 years before being released on probation. On June 30, 1978, he was convicted, for the same acts, in the District Court for the Northern District of Illinois, of the crime of conspiring to commit offenses against the United States, in violation of 18 U.S.C. 371. The presiding judge in the Northern District granted the respondent's request for a recommendation against deportation, pursuant to section 241(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(b)(2). In an Order to Show Cause issued on May 18, 1979, the respondent was charged with deportability based only on his 1977 conviction; the 1978 conviction was not mentioned. At a deportation hearing

begun on August 27, 1979, and completed on February 22, 1980, the respondent admitted the allegations in the Order to Show Cause, but denied deportability. He argued at the hearing, as he argues on appeal, that the recommendation against deportation issued by the Court for the Northern District bars his deportation altogether because both the 1977 and the 1978 convictions arose out of a single scheme of misconduct.

It does not appear to be disputed by anyone that both of the respondent's convictions arose out of a single scheme of criminal misconduct. Although the respondent makes much of this fact, the issue of whether these crimes arose out of a single scheme is not in fact relevant to the case. The respondent is charged with deportability under the first part of section 241(a)(4), which renders deportable an alien who is convicted of one crime involving moral turpitude committed within 5 years of entry, and who is either sentenced to confinement or confined for the crime for 1 year or more.[1] The "single

[1] The second part of section 241(a)(4) relates to aliens who are convicted of two crimes involving moral turpitude at any time after entry, regardless of whether the alien is confined for the crimes, so long as they do not arise out of a single scheme for the deportation of an alien who is convicted of a crime involving moral turpitude committed within 5 years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, *or* who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; (Emphasis added.)

scheme" aspect of section 241(a)(4) thus does not relate to the present case.

The real issue here is a narrow one: whether an alien who is granted a recommendation against deportation by a judge in one criminal proceeding is protected by that recommendation when he is convicted in another, separate criminal proceeding, in a different court and under a different charge, for the same underlying criminal misconduct, and the second court does not recommend against deportation. Although this question appears to be one of first impression, we have little trouble in resolving it. The section of the Act relating to recommendations against deportation provides that the provisions of section 241(a)(4) shall not apply "if the *court sentencing* such alien *for such crime* shall make . . . a recommendation . . . that such alien not be deported . . ." (Emphasis added.) Section 241(b)(2) of the Act. The respondent urges us to construe section 241(b)(2) liberally, and emphasizes Congress' ameliorative purpose in enacting the section, as well as the general rule that doubts in interpretation of the Act are to be resolved in favor of the alien. *See Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). The respondent also recognizes, however, that acts of Congress must, where possible, be given their plain meaning: this is a basic rule of statutory construction. *See e.g. Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Burns* v. *Alcala*, 420 U.S. 575 (1975); *Kelly* v. *United States*, 531 F.2d 1144 (2 Cir. 1976).

Despite Congress' liberal intent, we believe that the plain meaning of section 241(b)(2) requires us

to find that a judicial recommendation against deportation is effective to protect against deportation only for the crime or crimes for which an alien is convicted before that judicial tribunal.

We note that the District Court judge who issued the recommendation against deportation in the present case recognized the limitations of his recommendation. Exhibit E consists of a transcript from a January 18, 1980 hearing before that judge, during which the respondent's counsel sought to clarify whether the judge had considered the respondent's 1977 conviction when he recommended against deportation. The judge stated that he had considered the respondent's entire record, including the 1977 conviction. This clarification did not resolve the underlying problem, however, as the immigration judge understood. "On the other hand," he stated, "my recollection of the statute is that the recommendation is made by the Judge who enters the judgment and imposes sentence; and I certainly don't have any jurisdiction to engraft upon Judge Morgan's [the judge presiding over the 1977 conviction] judgment a recommendation." We agree with this analysis of the statute. Section 241(b)(2) speaks only of recommendations made by the court which sentences an alien for the given crime at issue in that court. It does not provide blanket protection for an alien, wherever he may face charges for his criminal act. For the respondent in this case to gain any protection from deportation under section 241(b)(2), he needed to obtain a recommendation against deportation from the Southern District of Illinois, as well as from the

Northern District. As no such recommendation was made by the Court, and it is now too late for such a recommendation,[2] we find that the respondent was properly found deportable under section 241(a)(4).[3]

The immigration judge also properly found the respondent ineligible for voluntary departure. *See* section 244(e) of the Act, 8 U.S.C. 1254(e). However, we note that the respondent may qualify for other discretionary relief. The fact that he has been a lawful permanent resident does not preclude him from applying for adjustment of status under section 245 of the Act, 8 U.S.C. 1255. *Tibke* v. *INS,* 335 F.2d 42 (2 Cir. 1964); *Matter of Loo,* 15 I. & N. Dec. 307 (BIA 1975); *Matter of Krastman,* 11 I. & N. Dec. 720 (BIA 1966). As he has a lawful permanent resident wife, he may be able to obtain that relief. In order to qualify for adjustment of status, an alien must be admissible to the United States. Section 245 of the Act. The respondent here is present-

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[2] A recommendation against deportation must be made at the time of judgment or sentencing, or within 30 days thereafter. This statutory requirement has been held to be mandatory. *See e.g. Velez-Lozano* v. *INS,* 463 F.2d 1305 (D.C. Cir. 1972); *Marin* v. *INS,* 438 F.2d 932 (9 Cir. 1971), *cert. denied,* 403 U.S. 923 (1971); *Piperkoff* v. *Esperdy,* 267 F.2d 72 (2 Cir. 1959); *Matter of Plata,* 14 I. & N. Dec. 462 (BIA 1973).

[3] The respondent does not appear to dispute that his conviction in the Southern District was for a crime involving moral turpitude, as required by section 241(a)(4). We note for the record that fraud is a specifically stated element of the respondent's conviction under 18 U.S.C. 472, and moral turpitude was thus correctly attached to that crime. *See Jordan* v. *DeGeorge,* 341 U.S. 223 (1951). *See generally Matter of Martinez,* 16 I. & N. Dec. 336 (BIA 1977).

ly inadmissible under section 212(a)(9), 8 U.S.C. 1182(a)(9), because of his convictions. He may, however, be able to receive a waiver of such excludability under section 212(h). An alien deportable under section 241(a)(4) is eligible to receive this waiver *nunc pro tunc. Matter of Sanchez,* Interim Decision 2751 (BIA 1980). Although the respondent in this case has not departed from the United States since the time of his excludable act, and thus cannot obtain *nunc pro tunc* relief, he could obtain the relief as an applicant for adjustment. Applicants for this relief have been held to be in the same position as aliens presenting themselves at the border, seeking entry as lawful permanent residents. *See Hamid* v. *INS,* 538 F.2d 1389 (9 Cir. 1976); *Campos* v. *INS,* 402 F.2d 758 (9 Cir. 1968); *Matter of Smith,* 11 I. & N. Dec. 325 (BIA 1965). Such aliens are therefore both subject to the exclusion provisions of section 212(a) and eligible for waivers of excludability. *See Matter of Smith, id.* Recognizing this, we have held that a 212(h) waiver may be obtained in deportation proceedings if it is granted in conjunction with adjustment of status. *See Matter of Bernabella,* 13 I. & N. Dec. 42 (BIA 1968).

We note that the respondent has a United States citizen child by his first wife, whom he helps to support, and also that his present wife testified at the hearing as to the hardship she might suffer if her husband is forced to leave the United States. These would of course be factors to consider, should the respondent apply for a 212(h) waiver and section 245 relief. As no steps have as yet been taken

to seek such relief, however, and as we have rejected the respondent's arguments regarding his deportability, this appeal must be dismissed.

ORDER: The appeal is dismissed.

DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

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21 I. & N. Dec. 296
Interim Decision: 3272

Decided April 12, 1996

In re Jose Mendez-Moralez,

Respondent

File A-41 940 178 - LINCOLN

CHARGE: Act of 1952—Sec. 241(a)(4) [8 U.S.C. 1251(a)(4)]—Convicted of crime involving moral turpitude committed within 5 years after entry, and sentenced to confinement for a year or more, to wit: passing counterfeit $20 Federal Reserve notes

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APPEARANCES: Clayton H. Brant, Esquire, Lincoln, Nebraska, *for respondent*

Paul R. Sctultz, District Counsel, *for the Immigration and Naturalization Service*

Before:

Board *En Banc*:
DUNNE, *Vice Chairman*;
VACCA, HEILMAN, HOLMES, HURWITZ, VILLAGELIU, FILPPU, COLE, and MATHON,
Board Members.

Concurring and Dissenting Opinion:

SCHMIDT, *Chairman*,
joined by, GUENDELSBERGER, *Board Member*.

Dissenting Opinion:

ROSENBERG, *Board Member*.

OPINION

VACCA, *Board Member*:

I. PROCEDURAL HISTORY

In a decision dated November 22, 1994, an Immigration Judge found the respondent deportable as charged under section 241(a) (2) (A) (i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(i)(1994), as an alien convicted of a crime involving moral turpitude committed within 5 years of entry into the United States. He also denied his application for adjustment of status under section 245 (a) of the Act, 8 U.S.C. § 1255 (a) (1994), as well as his corresponding application for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h) (1994), and ordered him deported from the United States to Mexico. The respondent has appealed from that decision. The appeal will be dismissed.

II. ISSUE PRESENTED

The respondent, a 42-year-old native and citizen of Mexico, was first admitted to the United States as a lawful permanent resident on May 2, 1988. He was convicted in a Nebraska court by a jury verdict on November 19, 1992, of first degree sexual assault, in violation of section 28-319(1)(c) of the Nebraska Revised Statutes. For this crime, committed in April or May 1992, the respondent was sentenced on January 5, 1993, to an indeterminate sentence of 2 to 3 years. Reportedly, he was released from prison on parole in January 1995, after having served 1 year of his sentence. The respondent conceded his deportability during the proceedings and has not contested his deportability on appeal. The only issue before us is whether the Immigration Judge properly denied the respondent's application for adjustment of status under section 245 of the Act and, in the exercise of discretion, the corresponding waiver of inadmissibility under section 212(h) of the Act. We find that he did.

III. ADJUSTMENT OF STATUS UNDER SECTION 245

Section 245 of the Act provides that the Attorney General may in her discretion adjust the status of an alien inspected and admitted or paroled into the United States to that of an alien lawfully admitted for permanent residence if the alien applies for adjustment, the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and an immigrant visa is

immediately available. An alien subject to deportation proceedings may also apply for adjustment of status before the Immigration Judge and, if inadmissible under section 212(a) of the Act, may also apply for a waiver of the ground of inadmissibility. *See* 8 C.F.R. § 242.17(a) (1995).

In the case before us the respondent's application for adjustment of status is based on his February 20, 1987, marriage to a United States citizen and the immediate relative visa petition she filed on his behalf, which was approved by the Immigration and Naturalization Service on November 21, 1994. As such, it appears that the respondent is eligible for an immigrant visa that is immediately available to him. The fact that he is a lawful permanent resident does not preclude him from applying for adjustment of status under section 245. *Tibke v. INS*, 335 F.2d 42 (2d Cir. 1964); *Matter of Parodi*, 17 I. & N. Dec. 608 (BIA 1980); *Matter of Loo Bing Sun*, 15 I. & N. Dec. 307 (BIA 1975); *Matter of Krastman*, 11 I. & N. Dec. 720 (BIA 1966); *see also Matter of Gabryelsky*, 20 I. & N. Dec. 750 (BIA 1993).

IV. WAIVER OF INADMISSIBILITY UNDER SECTION 212(h)

However, the respondent is not admissible to the United States as required for eligibility under section 245. By virtue of his conviction for a crime involving moral turpitude, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. An alien who is inadmissible under this section as an alien convicted of a crime involving moral turpitude may

seek a waiver of inadmissibility under section 212(h) of the Act. Section 212(h) may be used to waive inadmissibility which would otherwise preclude adjustment of status. *See Osuchukwu v. INS*, 744 F.2d 1136, 1139 (5th Cir. 1984); *Matter of Goldeshtein*, 20 I. & N. Dec. 382 (BIA 1991), *rev'd on other grounds*, 8 F.3d 645 (9th Cir. 1993); *Matter of Parodi, supra*; *Matter of Sanchez*, 17 I. & N. Dec. 218 (BIA 1980); *Matter of Shaughnessy*, 12 I. & N. Dec. 810 (BIA 1968).

Section 212(h) provides:

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—
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> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—
>
> (i) the alien is excludable only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is excludable occurred more than 15 years before the date of the alien's application for a visa, entry, or adjustment of status,
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> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture.

The amended version of section 212(h) essentially creates two categories of immigrants eligible for section 212(h) relief. The first category includes any immigrant who meets eligibility criteria that largely concern the type of exclusion ground involved or when the excludable activity occurred, as well as issues of the alien's rehabilitation and the national welfare, safety, or security of the United States. The second category includes immigrants who demonstrate the requisite relationship

to a United States citizen or lawful permanent resident, and establish that their exclusion would result in extreme hardship to that relative. *See Matter of Alarcon*, 20 I. & N. Dec. 557 (BIA 1992). In the case at hand, the respondent, who is assimilated to the position of an immigrant for purposes of seeking adjustment of status, is married to a United States citizen and has three United States citizen children. As such, he may demonstrate eligibility under section 212(h)(1)(B) of the Act by establishing extreme hardship to his United States citizen wife or children if he were excluded.

In his decision the Immigration Judge in fact found that extreme hardship to the wife and children had been established, and that the respondent consequently was eligible for section 212(h) relief. However, he denied the section 212(h) waiver in the exercise of discretion, and accordingly found him ineligible for adjustment of status because of his inadmissibility resulting from his criminal conviction.

A. Exercise of Discretion Under Section 212(h)(1)(B): Factors Considered

On appeal, the respondent has contested the discretionary denial of relief, arguing that he merited a favorable exercise of discretion in light of his equities and the hardship to his family if he were deported. In the respondent's view, the Immigration Judge erred in ruling that he had not demonstrated rehabilitation and in placing too much emphasis on his claim of innocence of the crime of which he was convicted. According to the respon-

dent, the Immigration Judge also erred in requiring that rehabilitation be shown.

As is true for other discretionary forms of relief, the burden is on the applicant to establish that a grant of a waiver of inadmissibility under section 212(h)(1)(B) of the Act is warranted in the exercise of discretion. See *Matter of Fernandez*, 14 I. & N. Dec. 24 (BIA 1972). This has been held to be the case for other waivers of inadmissibility. *See Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978) (section 212(c) waiver). As is also true for other waivers of inadmissibility that would allow an alien to be admitted to the United States as a lawful permanent resident, the Immigration Judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *See id.*

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir. 1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and

applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

What we do not find applicable is the analysis for determining whether adjustment of status under section 245 of the Act is warranted in the exercise of discretion, as set forth in *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970). There, the Board ruled that generally where there are adverse factors present, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of discretion, and that in the absence of adverse factors, adjustment will be ordinarily granted in discretion. *See also Matter of Blas*, 15 I. & N. Dec. 626 (BIA 1974; A.G. 1976). This approach has no application to relief under section 212(h) of the Act. A waiver of inadmissibility under section 212(h) necessarily involves at least one adverse consideration, specifically the criminal conviction or activity constituting the ground of exclusion sought to be waived. *See Matter of Marin*, *supra*, at 585. Thus, there can be no presumption that relief is warranted in the exercise of discretion. Further, this criminal conviction or activity would usually be more severe than any adverse factor present in the application for adjustment of status, presuming admissibility and general eligibility for adjustment of status.

These principles taken from *Matter of Marin*, *supra*, are to be applied in the context of the particular considerations that will arise in an application

for section 212(h)(1)(B) relief. Section 212(h)(1)(B) relief is its own distinct form of waiver, with the balancing of factors to be undertaken in view of the particular purposes either stated or inherent in the statute. To exemplify, we would emphasize two considerations that do not often arise in an application for section 212(c) relief. First, a section 212(h) applicant seeking to adjust his status need not be, and in most cases is not already, a lawful permanent resident, and those lawful permanent residents that do apply may not necessarily have the length of residency attained by those eligible for section 212(c) relief. Secondly, those found eligible for relief under section 212(h)(1)(B) will by definition have already established extreme hardship to qualified family members, which would be a factor favorable to the alien in exercising discretion.

We emphasize that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create any entitlement to that relief. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. We would note, however, that an application for discretionary relief, including a waiver under section 212(h), may be denied in the exercise of discretion without express rulings on the question of statutory eligibility. *Matter of Goldeshtein*, *supra*; *see also Silva v. Carter*, 326 F.2d 315, 320 (9th Cir. 1963), *cert. denied*, 377 U.S. 917 (1964); *cf. INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976). We also emphasize that the discretionary analysis discussed is specifically appli-

cable only to those aliens applying for relief under subsection (B) of 212(h)(1), subsection (A) having particular eligibility criteria that, if met, will affect the exercise of discretion.

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. *See, e.g., Matter of Marin, supra,* and cases cited therein. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). *See, e.g., id.,* and cases cited therein.

Upon review of the record as a whole, the Immigration Judge is required to balance the equities and adverse matters to determine whether discretion should be favorably exercised. The basis for

the Immigration Judge's decision must be enunciated in his opinion. *See, e.g., id.* The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *See, e.g., id.*

The underlying significance of the adverse and favorable factors is also to be taken into account. For example, if the alien has relatives in the United States, the quality of their relationship must be considered in determining the weight to be awarded this equity. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), *cert. denied* , 507 U.S. 971 (1993). Similarly, if the alien has a history of employment, it is important to consider the type of employment and its length and stability. Further, when looking at the length of the alien's presence in the United States, the nature of his presence during this period must be evaluated. For example, a period of residency marked by a term of imprisonment diminishes the significance of the period of residency. *See general-*

ly Douglas v. INS, 28 F.3d 241 (2d. Cir. 1994) (residency marked by criminal activity).

B. Exercise of Discretion in Respondent's Case

Having reviewed the record and the Immigration Judge's decision, and the contentions made on appeal, we agree with the Immigration Judge that a favorable exercise of discretion is not warranted. The respondent has demonstrated equities that may be characterized as substantial. Although he has only been in this country lawfully for a little more than 7 years, he does have significant family ties, including his United States citizen wife of 8 years. His United States citizen children include a 9-year-old stepson, a 7-year-old daughter, and a 4-year-old son. According to the wife's testimony, the respondent has been a loving father and the children are close to him emotionally. The respondent also has a consistent history of employment as an agricultural worker and mechanic at various ranches, and he has testified that his most recent employer has assured him of a position as a mechanic at $6 an hour upon his release from prison. The record also reflects that the respondent has continuously supported his family financially before his incarceration, except for a period in 1991 when he injured his back. The family began receiving food stamps that year, and since his incarceration they have also received welfare payments and housing assistance as well. The respondent's wife last worked as a cashier for a department store

from 1989 to 1991, when she was terminated from her employment because she was pregnant.

The respondent also has other family ties in the United States, including two lawful permanent resident brothers living in Colorado and Kansas, a sister living in Colorado, and his lawful permanent resident parents, who also live in Colorado and who are self-supporting. The respondent testified that his sister was not a lawful permanent resident, but he did not elaborate as to her specific status in this country. The respondent also testified that he has two children in Mexico, but he has no contact with them and does not know their whereabouts.

As noted above, the Immigration Judge found that the respondent's departure would cause extreme hardship to his wife and children, as they are dependent upon him financially and are emotionally close to him. The wife testified that if her husband were deported she would remain in the United States with the children and likely move to Kansas with her adoptive father. She also testified that she was receiving psychiatric treatment for depression, noting that she had attempted to commit suicide in 1992 after the criminal charges were filed against her husband, and observing that she was attempting to obtain disability payments. She also observed that she had a medical condition involving her spine and hips that precluded her from lifting things.

In sum, the respondent has demonstrated substantial equities in his favor, including hardship to his wife and children if he were deported. Some hardship to the respondent is also apparent in view

of his ties to this country and the poor economic conditions in Mexico, as documented by news articles submitted by the respondent, although he has not demonstrated that he would be virtually precluded from finding employment in Mexico. However, his equities must be balanced against the adverse factors in his case, particularly the serious crime of which he was convicted. The seriousness of his crime can be seen from a reading of the statute under which he was convicted and the surrounding circumstances. The Nebraska statute in question provides:

> Sexual assault; first degree; penalty.
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> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.
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> (2) Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor shall have caused serious personal injury to the victim in reaching his decision on the sentence.
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> (3) Any person who shall be found guilty of sexual assault in the first degree for a second time

> shall be sentenced to not less than twenty-five years and shall not be eligible for parole.

Neb. Rev. Stat. § 28-319 (1992).

The respondent was convicted under section 28-319(1)(c) of sexually penetrating a victim under the age of 16. In fact the record before the Immigration Judge made clear that the respondent's victim was 13 years old at the time of the sexual assault, at a time when he was 40 years of age.[1] The young girl, who lived in the same apartment building, frequented the respondent's home. Apparently she practically lived there, reportedly because her own mother was mentally disabled to some degree and did not exert much parental control, and the respondent and his wife were not willing to force her to leave. The respondent has acknowledged that their unwillingness to force her to leave led to situations where the young girl was present when he and his wife were watching sexually explicit movies or engaging in sexual intercourse themselves. He has also admitted soliciting the victim's mentally disabled mother for sex, as repayment for money the mother had borrowed from him. According to the respondent, he did this in order to discourage her from asking to borrow more money.

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[1] While the Immigration Judge and this Board may not go beyond the record of conviction to determine the guilt or innocence of the alien, it is proper to look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted. *Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990).

The circumstances of his crime clearly show its egregiousness.

We point out that as a matter of law, a 13-year-old child is incapable of consent where the act is being perpetrated by a grown man 27 years older. Where a statute makes sexual acts with a child under a specified age a crime, without regard to consent, such statutes are construed as fixing the age of consent. The purpose of these statutes is to protect children from illicit acts by rendering them incapable of consenting. *See Matter of Dingena*, 11 I. & N. Dec. 723 (BIA 1966).

Given the nature of the respondent's crime, we do not find that his equities are sufficient to counterbalance its seriousness. We find this to be particularly so given that his equities do not include any persuasive evidence of rehabilitation. We do not find his release from prison after 1 year due to his good conduct in following prison rules in a controlled setting to be persuasive evidence of rehabilitation from his criminal act of sexually assaulting a young child. At his hearing, the respondent denied that the sexual assault ever occurred, stated that he had been "falsely accused," and did not express remorse for his crime. In addition, when asked whether he had attempted to get any "sexual offender treatment," he responded, "I believe that I do not have a sexual problem."

The respondent argues on appeal that his assertion of innocence should not be used against him because he is, in fact, innocent and the criminal justice system makes mistakes, and he therefore should not be forced to be dishonest with himself.

However, in ascertaining the effect of a criminal conviction, neither the Board nor the Immigration Judge may go beyond the judicial record to determine the guilt or innocence of an alien. *See Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990); *Matter of Khalik*, 17 I. & N. Dec. 518 (BIA 1980). He must be considered guilty of the crime. Taking responsibility and showing remorse for one's criminal behavior does constitute some evidence of rehabilitation. *See Gonzalez v. INS*, 996 F.2d 804 (6th Cir. 1993); *Villareal-San Miguel v. INS*, 975 F.2d 248 (5th Cir. 1992); *Akrap v. INS*, 966 F.2d 267 (7th Cir. 1992). This is not to say that an alien who claims innocence and does not express remorse could never present persuasive evidence of rehabilitation by other means. But the fact remains that in the case before us, there is no evidence of remorse or of acknowledgement of guilt. Moreover, the claim of innocence is inconsistent with the jury verdict and the respondent's own pre-trial admission that he had engaged in sexual intercourse with the victim.[2]

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[2] The respondent underwent a polygraph examination in July 1992. A copy of the polygraph report was admitted into evidence at the deportation hearing without objection. The report reflects that following the questioning of the respondent, he acknowledged to the examiner that he had engaged in a sexual act with the victim. When questioned about this by the Immigration Judge, the respondent acknowledged this admission, but testified that the polygraph examiner kept "moving the needles with his fingers . . . and after that [he] was forced to say yes." In his decision, the Immigration Judge found that the respondent's testimony in this regard was not credible. On appeal, the respondent does not challenge, or even reference, this evidence and adverse finding by the Immigration Judge.

The Board acknowledges the humanitarian concerns in this case, particularly the hardship to the respondent's wife and children, but the Board also has the obligation to consider the welfare and safety of the other citizens and residents of this country in making its discretionary determination. In the case before us, we have an individual who sexually assaulted a 13-year-old girl. After serving a short period of imprisonment, he has not offered any significant evidence that he is rehabilitated from his criminal behavior.

As pointed out by the respondent on appeal, a showing of rehabilitation is not an absolute prerequisite in all cases involving an alien with a criminal record. However, rehabilitation or the lack thereof is a factor to be considered in the exercise of discretion, and it may be ultimately determinative in some cases. *See Matter of Edwards, supra.* There will be cases where such a showing is necessary before a favorable exercise of discretion is warranted in view of the other aspects of the case. Thus, while the lack of persuasive evidence of rehabilitation may not in itself be an adverse factor, the absence of this equity in the alien's favor may ultimately be determinative in a given case, particularly where an alien has engaged in serious misconduct and there are questions whether the alien will revert to criminal behavior. Conversely, evidence of rehabilitation in some cases may constitute the factor that raises the significance of the alien's equities in total so as to be sufficient to counterbalance the adverse factors in the case and warrant a favorable exercise of discretion.

However, having weighed the respondent's equities in this case, which do not include persuasive evidence of rehabilitation, against the extremely serious nature of his criminal behavior involving a sexual offense against a child, the Board agrees that the respondent has not met his burden of establishing that a grant of section 212(h) relief is warranted in the exercise of discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Concur By:
SCHMIDT (In Part)

Dissent By:
SCHMIDT (In Part); ROSENBERG

Dissent:

CONCURRING/DISSENTING OPINION:

PAUL W. SCHMIDT, *Chairman*, in which JOHN GUENDELSBERGER, *Board Member*, joined

I respectfully concur in part and dissent in part. I concur in the analysis of the general criteria to be applied in exercising discretion under section 212(h) of the Immigration and Nationality Act, 8.U.S.C. 1182(h) (1994), as contained in parts I, II, III, and IV(A) of the majority opinion. However, I dissent from the application of those criteria to

the facts of this case, as contained in Part IV (B) of the majority opinion.

As recognized by the majority, the respondent has very substantial family equities in the United States. He has a United States citizen wife of 8 years, two United States citizen children, a 7-year-old daughter and a 4-year-old son, and a 9-year-old United States citizen stepson. His wife suffers from severe depression and other medical conditions. She has not worked in 4 years. There has been a finding that the respondent's deportation would cause extreme hardship to his wife and children, as they are dependent upon him financially and are emotionally close to him.

The respondent also has other family ties to the United States, including two lawful permanent resident brothers and lawful permanent resident parents. The majority acknowledges that the respondent's economic outlook in Mexico is bleak, thereby inhibiting his ability to contribute to the support of his family in the United States.

It also seems unlikely that his family will be able to afford to visit the respondent in Mexico. The respondent's ability to visit his family in the United States will depend upon the willingness of the United States Department of State to recommend, and the Immigration and Naturalization Service to grant, a waiver of inadmissibility to an inadmissible nonimmigrant. Moreover, from my experience, it is quite possible that, even with a waiver, the respondent would be precluded from future visits as a nonimmigrant because the presence of an immediate family in the United States would be

considered evidence of a lack of "proper nonimmigrant intent" on the respondent's part. Therefore, the respondent's deportation is likely to permanently sever the family unit.

The respondent's crime is serious, involving sexual misconduct with a minor. However, the respondent, who is 42 years old with no known prior history of sexual offenses, was required to serve only 1 year of a potential 3-year sentence. That indicates at least some confidence on the part of the State of Nebraska that the respondent's sexual offense was unlikely to be repeated and that its citizens did not need the extra protection from the respondent that a longer sentence might have offered.

As described by the majority, the respondent was convicted under a Nebraska statute that made the element of consent by the minor irrelevant. It appears that the rather unusual interrelationship between the respondent's family and the victim's family, which provided the context for the sexual assault on the 13-year-old victim, no longer exists and is unlikely to be replicated. Therefore, although we all admittedly lack clairvoyance, there is some reason, based on this record, to believe that a repetition of the respondent's serious sexual misconduct is unlikely.

In addition to the nature of the crime, the majority's other primary reasons for denying relief are interrelated and involve the respondent's failure to demonstrate remorsefulness, truthfulness, and rehabilitation when confronted with his crime during the hearing before the Immigration Judge.

These interrelated adverse considerations, while serious, do not, in my opinion, warrant a denial of the section 212(h) waiver to the respondent. *See Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990).

This is admittedly a close case. However, I believe that the extreme hardship that will be suffered by the respondent's United States citizen family, his extensive family ties to the United States, and the evidence of record suggesting a relatively low risk of recidivist behavior outweigh the adverse factors relied upon by my colleagues in the majority. I therefore would grant the respondent a section 212(h) waiver.

Consequently, I respectfully dissent from Part IV(B) of the majority decision which denies the section 212(h) waiver in the exercise of discretion.

DISSENTING OPINION:

LORY D. ROSENBERG, *Board Member*

I respectfully dissent.

This case involves an individual who has been convicted of one serious crime of moral turpitude. As a result he has applied for a waiver and demonstrated that he is statutorily qualified for the waiver he needs, as his wife and children will suffer extreme hardship in the event of his deportation. Despite this, the Immigration Judge denied his waiver application and the majority of this Board affirms that denial. At issue in the resolution of this appeal is this Board's interpretation of the

statute governing applications for waivers under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (1994), and this Board's application of the standard it employs in the exercise of discretion in such cases.

My quarrel with the reasoning and conclusion adopted by the majority goes beyond a disagreement over the weight to be given the favorable and adverse factors of record and the outcome of that balancing exercise. In my view, the majority makes a fundamental error when it embraces exclusively this Board's articulation of discretionary factors which make up the entirety of a waiver adjudication under section 212(c) of the Act. *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978). Such an analysis fails to give meaning to the unique statutory language which characterizes a waiver under section 212(h) and distinguishes it from other waivers provided by the Act. While the majority cautions that "it is prudent to avoid cross-application" between different principles or standards for the exercise of discretion, these well-intentioned words of caution do not prevent its inevitable descent down this slippery slope.

I. IMPROPER CONSTRUCTION OF THE STATUTE

The starting point of any interpretation begins with a construction of the statute. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). If the statutory language is clear, both the courts and the Board must give effect to

the unambiguously expressed intent of Congress. *Matter of Farias*, Interim Decision 3269 (BIA 1996) (Holmes, Rosenberg, concurring); *Matter of Hou*, 20 I. & N. Dec. 513, 519-20 (BIA 1992); *see also K Mart v. Cartier, Inc.*, 486 U.S. 281, 291 (in ascertaining "plain meaning," the Board must look not only to the statutory language at issue, but to the language and design of the statute as a whole).

The text of the particular section at issue here, which provides a discretionary waiver for acts of prostitution and crimes involving moral turpitude, is found in the opinion of the majority. Notably, as most recently amended in 1990, it contains two subsections: one, section 212(h)(1)(A), governs applications by persons who seek a waiver for offenses which occurred more than 15 years before the application and explicitly requires a showing of rehabilitation, but does not require either that certain family relationships exist or that a showing of extreme hardship to those persons be made as a predicate for the exercise of discretion. The other, section 212(h)(1)(B), with which we are concerned here, does require both the existence of specific family relationships and evidence of extreme hardship to those designated persons in the absence of a waiver. There is no statutory requirement either that any particular amount of time must have passed since the offense giving rise to the need for the waiver, or that rehabilitation be demonstrated or that admission be in the national interest.

This Board, acknowledging the principle underlying the Supreme Court's decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), has stated:

"It is a well-established rule of statutory construction that, in cases in which Congress includes particular language in one section of a statute but omits that language in another . . ., a presumption arises that the disparate inclusion and exclusion was intentional and purposeful." *Matter of Hou*, supra. I believe that the reasoning employed and the result reached by the majority in this case depart without reason from this important maxim.

In my opinion, to best effectuate the intent of Congress as expressed by the statutory language of any discretionary waiver within the Act, the equities should be weighed and balanced differently relative to the statutory eligibility factors required. If that is not done in this case, then the statutory language distinct to section 212(h)(1)(B), as compared to other waivers provided by the statute, is rendered meaningless.

A. Section 212(h)(1)(B) Explicitly Requires Evidence of Extreme Hardship to Family Members

In a section 212(h)(1)(B) case, the statutory emphasis is on the existence of specified close family members and a showing of extreme hardship to those family members. Close family ties and a compelling level of economic, personal, or professional harm or suffering amounting to extreme hardship are statutory predicates for the exercise of discretion. By contrast, in section 212(c) applications, they are no more than individual considerations, albeit important and arguably primary ones, in the overall exercise of discretion.

While it might constitute a reasonable exercise of discretion to deny a waiver under section 212(c) despite evidence of close family ties and hardship on the basis that these are merely factors on the positive side of the discretionary equation, I cannot conclude that comparable treatment of the same factors in a section 212(h) waiver case would be appropriate. The majority tends to ignore the statutory distinction between these waiver provisions, and fails to treat the section 212(h) waiver applicant as entering into the discretionary arena already having met a significant mandatory standard which itself necessitates the assembly of impressive favorable factors. Rather, the majority appears to give little if any weight in the subsequent exercise of discretion to the fact that a section 212(h) applicant has already established close family ties and extreme hardship.[1]

Further, I take issue with the conclusion of the majority that the precedent decisions issued by this Board pertaining to adjustment of status

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[1] The majority's citation to *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976), and *Matter of Goldeshtein*, 20 I. & N. Dec. 382 (BIA 1991), *rev'd on other grounds*, 8 F.3d 645 (9th Cir. 1993), for the proposition that an adjudicator need not even address the statutory "extreme hardship" predicate for the exercise of discretion in suspension and section 212(h) adjudications is misleading in the context of this case. While it is true that an adjudicator need not make express rulings concerning statutory eligibility, and may skip ahead to a discretionary denial in appropriate cases, this does not provide the adjudicator with a license to ignore relevant factors in rendering that discretionary determination.

under section 245 of the Act are inapposite. A waiver under section 212(h) historically and literally arises in connection with an application for admission, since, to date, this Board has not recognized the availability of this waiver to those within the United States only seeking to avoid deportation. *Cf. Yeung v. INS*, 76 F.3d 337 (11th Cir. 1996). The typical waiver applicant either is not yet a lawful permanent resident or is a lawful permanent resident seeking that status anew. *See Matter of Gabreylsky*, 20 I. & N. Dec. 750 (BIA 1994).[2] While some immigrant visas are provided for those approved in asylee, refugee, or employment-based categories, over two-thirds of immigration to the United States is based upon family relationships, and family reunification is a fundamental purpose underlying the terms of Act. I cannot agree that our decisions concerning the exercise of discretionary factors involving the admission of close family relatives have no applicability here.[3]

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[2] The respondent has resided in the United States since 1983 and has held the status of a lawful permanent resident for over 7 years. He is applying for lawful resident status anew, in conjunction with his application for a waiver.

[3] It appears that the reason the majority dismisses as inapplicable the discretionary evaluations conducted in *Matter of Arai*, 13 I. & N. Dec. 494, 495-96 (BIA 1970), modifying *Matter of Ortiz-Prieto*, 11 I. & N. Dec. 317 (BIA 1965) (holding that adjustment of status could be granted only when out-

B. Section 212(h)(1)(B) Explicitly Does Not Require Evidence of Rehabilitation

The majority finds not only that the statutory standard has been satisfied but that substantial equities exist. That being the case, one might ask, why then does the majority conclude the waiver is not warranted? The only bases articulated by the majority are the nature of the conviction involved and the issue of rehabilitation in the respondent's case. While these are not improper factors for consideration in the ultimate discretionary equation in either a section 212(c) or a section 212(h) case, it is notable that the factor of rehabilitation specifically is not a statutory prerequisite to the exercise of discretion in a section 212(h) application submitted under section 212(h)(1)(B).

In my view, however, by importing without distinction the established discretionary factors applicable in a section 212(c) adjudication (where rehabilitation is an equity, *see Matter of Marin*, *supra*) into a section 212(h) adjudication, the majority has skewed the basis for a reasonable adjudication consistent with the governing statu-

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standing equities were present), is that the adverse factor which triggers the need for a section 212 (h) waiver is a criminal conviction. Nonetheless, I believe it instructive that we found that *Ortiz-Prieto* was "too broad in its impact and probably more demanding than necessary," and concluded that factors such as family ties, hardship, and length of residence constitute countervailing factors warranting a favorable exercise of discretion. *Matter of Arai*, *supra*, at 495.

tory section and the fair exercise of discretion.[4] Not only does the majority consider rehabilitation in this case, but it elevates rehabilitation as at least one of two determinative factors in its denial. A reading of the majority decision suggests that the statutorily required elements of close family ties and extreme hardship pale next to the presence or absence of rehabilitation. Moreover, I believe that the emphasis given its finding that rehabilitation is not present (which I dispute) constitutes an improper assessment of rehabilitation contrary to our holdings in both *Matter of Arreguin*, Interim Decision 3247 (BIA 1995) (stating that absence of one or more favorable factors does not convert such factors into adverse considerations), and *Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990) (holding that absolute rehabilitation is not required).

II. IMPROPER BALANCING OF DISCRETIONARY FACTORS

A. Undue Emphasis on Admission of Guilt

While rehabilitation is not a statutory requirement, it is not unreasonable to consider this factor in light of the fact that a section 212(h)(1)(B) waiver overcomes excludability based upon either criminal conduct or a conviction. However, in its

[4] For example, the majority states that "he has only been in the United States for a little more than 7 years." (Emphasis added.) While this may be relevant in a section 212 (c) case, in fact, a waiver under section 212 (h) was originally contemplated to provide a means of overcoming excludability for a new immigrant who has not been in the United States at all.

discretionary determination, the majority follows the course set by the Immigration Judge and treats the absence of an outright admission of guilt by the respondent as dispositive of the absence of rehabilitation. *Cf. Matter of Roberts*, 20 I. & N. Dec. 294 (BIA 1991). In my view, this constitutes an impermissible treatment of the rehabilitative element of remorse, contrary to the decisions of this Board and the courts of appeals. *See Guillen-Garcia v. INS*, 999 F.2d 199 (7th Cir. 1993); *Matter of Edwards*, supra. I am inclined to adopt the reasoning of the United States Court of Appeals for the Seventh Circuit, which was articulated most recently in *Canales-Lopez v. INS*, No. 95-2113, 1996 WL 21673 (7th Cir.),[5] that reliance on a failure or refusal to acknowledge guilt, no matter how framed, "does not constitute adequate consideration of all the circumstances surrounding the petitioner's efforts to demonstrate rehabilitation." *Id.* at 2 (citing *Guillen-Garcia v. INS, supra*, at 205); *see also Guillen-Garcia v. INS*, 60 F.3d 340, 344-45 (7th Cir. 1995) (upholding BIA *on other grounds*), *cert. denied*, 116 S.Ct. 775 (1996).

Elevation of a claim of innocence as dispositive of a lack of rehabilitation actually does what we say we will not do—redetermine guilt or innocence. *Cf. Matter of Roberts, supra. Matter of Roberts* states

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[5] While I understand that *Canales-Lopez v. INS, supra*, is an unpublished decision, it provides a compelling analysis of this Board's consideration of the element of an admission of guilt in the context of establishing rehabilitation as a discretionary equity, one which I adopt for purposes of my dissent in this case.

clearly that for discretionary purposes we may look behind the conviction—but we may not redetermine guilt or innocence. *Id.* at 301. If we are allowed to look at mitigating factors (and lack of culpability going to an inability to express remorse for something one has not done would fall into that zone), we should not penalize an alien who testifies to innocence under oath, barring a showing that he has intentionally given false testimony. An individual faces an untenable situation if subsequent discretionary relief—be it sentencing disposition or collateral immigration benefits—is conditioned upon an admission of guilt. As a result, some federal courts have long recognized that even after conviction, when post-conviction options may have been exhausted, it continues to be unfair and unreasonable to require a defendant to admit guilt (contrary to his testimony in the criminal proceedings), as to do so also might be to require him to admit perjury.[6]

In this case, the respondent did not plead guilty in his criminal trial but maintained his innocence and was found guilty. In the record before us, the

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[6] *See Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966), in which the court determined that the defendant was "between the devil and the deep blue sea," when the district court told him to repent or receive a longer sentence. *See also Miller v. United States*, 589 F.2d 1117, 1138 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969). In fact, the *Scott* court noted that a glib willingness to admit guilt in order to secure something in return may indicate quite the opposite of repentance.

respondent admitted to aspects of the criminal conduct in question and denied the explicit charges underlying his conviction.[7] The Immigration Judge acknowledged that the respondent testified that he recognizes the crime involved to be a serious one, for which someone should be punished. The majority emphasizes the fact of the respondent's responses on the lie detector test administered prior to trial as compared with his testimony before the Immigration Judge.[8] This not only appears to contravene this Board's posi-

[7] Evidence in the record, contained in the investigating officer's report and in a pre-trial polygraph report, reflects that an unorthodox situation had developed in the apartment complex, that the assaulted child was in counseling with a social worker, that she received no parental control or guidance, that rumors of a sexual relationship between the child and the respondent had been circulated by the child throughout the apartment complex, and that a prior investigation had revealed no evidence of such a relationship. The respondent does not deny having improperly touched the child or having allowed her to remain in his family's apartment, and he admits that he wrestled with her and even that he had, in his wife's presence, lain on top of her.

[8] The report of the lie detector examination reveals that upon admitting having had sexual intercourse with the complainant, the respondent explained further that the complainant, a neighbor's daughter, approached him in his apartment, and lay down on his bed next to him. While I don't doubt that the alleged sexual contact occurred, I can understand how, in the hearing before the Immigration Judge, the respondent, not being legally trained to understand the concept of a minor's lack of consent, and given the unorthodox situation which preceded this incident, would not think of his conduct necessarily as forcible sex or a sexual assault, as the charge and conviction is worded.

tion in *Matter of Roberts, supra*, but the majority fails to indicate the ultimate significance of either the respondent's statement or the results of the test.[9] This is particularly so, in light of the fact that the majority itself acknowledges in the same paragraph that one who claims innocence is not categorically foreclosed from establishing that he has taken steps towards rehabilitation. *Matter of Edwards, supra.*

In assessing rehabilitation, we are making "an estimate or prediction of an individual's future conduct." *Palacios-Torres v. INS*, 995 F.2d 96, 99 (7th Cir. 1993). The respondent and his wife are well aware of the poor judgment and unacceptable conduct which characterized their former living situation. The family has moved away from the area in which the circumstances giving rise to the respondent's crime occurred. There is no evidence of any criminal conduct whatsoever by the respondent prior to the situation which underlies the respondent's conviction. Further, there is no evidence of recidivism during the pendency of the criminal charges or since his release for good behavior

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[9] Under the circumstances, he could honestly admit the act but deny the charge as entitled in the record of conviction without being inconsistent or incredible. *See Canales-Lopez v. INS, supra*, at 2 (Board's denial of relief as being on account of lack of credibility rather unacceptable, as relief cannot be denied on this basis alone, and lack of credibility for failing to acknowledge guilt is not a separate ground supporting a denial). *See also Guillen-Garcia v. INS, supra*, at 205.

following a 1-year period of incarceration, an early release from a 3-year sentence.[10]

The majority contends that it is not holding that one who claims innocence and fails to express remorse is precluded from ever showing persuasive evidence of rehabilitation. However, here the respondent has presented his role in his family, his productive employment, and the absence of any other criminal conduct. The majority's failure to articulate any other basis for its rejection of the respondent's claim of rehabilitation, however, renders its treatment of the absence of an admission of guilt as being determinative of an insufficient level of rehabilitation. *Canales-Lopez v. INS, supra*; *cf. Matter of Edwards, supra.* I believe that reliance upon the absence of evidence of remorse, coupled only with the serious nature of the single criminal offense giving rise to this respondent's need for a waiver is not a sound basis on which to deny relief in this case.

B. Undue Weight Given Criminal Offense

This is a waiver we are adjudicating. It presupposes a violation of the immigration laws. An application under section 212(h) comes before us only when there has been either conduct involving prostitution or conviction or admission of a crime involving moral turpitude. No applicant will ever

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[10] The record reflects that while in prison the respondent achieved "exemplary unit conduct and observed work performance," and that he had no infractions and conducted himself according the institution's rules and orders.

appear before us who has not committed an offense which we consider, in some degree, reprehensible. In my opinion, the result reached by the majority certainly appears to approach an impermissible per se basis in which to deny a discretionary waiver. *See Gonzales v. INS*, 996 F. 2d 804, 810 (6th Cir. 1993); *cf. Matter of Burbano*, 20 I. & N. Dec. 872, 877-78 (BIA 1995). *But see Yepes-Prado v. INS*, 10 F.3d 1363, 1371-72 (9th Cir. 1993).

Indeed, I believe we contravene the statute when we so readily engage in the practice of finding the offense to be waived an adequate basis alone on which to deny relief.[11] Moreover, I don't believe that one can read the majority opinion without concluding that it has relegated the significant and compelling factors of family ties and extreme hardship to the back burner. I cannot find that dismissing statutory prerequisites or treating them as no

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[11] I recognize that we have said consistently in the section 212(c) context that a single factor may be so egregious as to overwhelm any existing equities. *Matter of Marin*, *supra*, at 584-85. I do not disagree with that principle nor do I disagree with the majority that we must also consider the safety and well-being of others in our society. I do not foreclose the possibility that, based on concrete evidence of recidivism, a propensity for violence, or actual harm that will be caused by allowing an offender to remain in this country, denial based upon a single underlying offense might not be appropriate. However, I read *Matter of Marin* to mean that when dealing with the offense to be waived, such a result, while not impermissible, must be the exception rather than the rule. *See also Braun v. INS*, 992 F.2d 1016, 1020 (9th Cir. 1993); *Matter of Alonzo*, 17 I. & N. Dec. 292 (Comm. 1979) (if underlying offense is considered, a waiver could be denied in every case).

more than a threshold for a discretionary adjudication which demands other factors to overcome the adverse factor of the offense giving rise to the need for a waiver is either reasonable in the exercise of discretion or consistent with the statute.

The respondent is in violation of the immigration laws on account of a single, albeit serious, conviction, giving rise to his need for a section 212(h) waiver. His crime, statutory rape of a young teenager, is not to be dismissed lightly and it should be punished—in the criminal justice system, and examined further—in the exercise of our discretion to waive his deportation. Whether it is an offense such that under no circumstances should this man be allowed to remain in the United States with his family as a lawful permanent resident after being released from prison with good conduct reports and when his wife and children want and need him is another story.

The respondent has established, as the majority concedes, substantial equities relating to the statutory qualifications of close family ties and extreme hardship to be suffered by the family members should the respondent be deported. His wife begs us to allow him to remain, and there is ample evidence in the record that she has suffered depression on account of the circumstances and other hardships due to his absence, which will only be exacerbated by his deportation. Further, his deportation would mean not only a loss of financial support to the household and his children's loss of the presence of their father, but the permanent disruption of this family.

In addition to the factors emphasized explicitly by Congress, the record reflects that the respondent has resided in the United States for 13 years and has been a lawful permanent resident since 1987. There is evidence that he is a responsible husband and father who previously was regularly employed and supported his family, and that he has employment to which he will return. While in prison he studied towards receiving his GED. The record also contains enthusiastic commendations of his character and of his being an honest, hard-working individual. Each of these factors individually and cumulatively indicates that he has the character and family base from which he can return to society as a contributor rather than a predator, and that he has taken steps towards rehabilitation from the conduct resulting in his conviction.

With regard to his conviction, I believe he attempted to provide an explanation for his criminal conduct, and while his unwillingness to acknowledge his offense squarely may be the product of shame or denial, I don't find him to be either an outright liar or an unrepentant criminal. Nor do I conclude, as apparently the majority does, that his failure to acknowledge culpability to their satisfaction is a reliable indicia of either rehabilitation or future conduct. With the exception of the poor exercise of judgment in condoning the situation which led to his commission of the crime in question, there is no evidence that the respondent lived other than a normal lifestyle. He has no criminal record of any kind other than the offense giv-

ing rise to these proceedings. He has no prior immigration violations. He provided evidence of good conduct while in prison.

I note that this crime was an aberration in his otherwise law-abiding history and appeared connected to the unorthodox circumstances of the family's living situation in relation to their former neighbors. That living situation no longer exists. In my opinion there is absolutely no reason to conclude that he would not move on from this incident, which I view as an aberration in an otherwise regular record, and continue to be a provider for his family and a contributing member of our society.

I do not contend that this Board may not or should not address either the offense itself or rehabilitation in the course of adjudicating a waiver application under section 212(h) of the Act. However, in this case, the majority not only fails to address any other aspect of rehabilitation present in the record, but concludes, without citing any evidence of record or other authority, that the nature of the crime for which this applicant already has been convicted and imprisoned is serious enough to make him an undesirable member of our society in the future. I conclude that such a treatment of the record not only constitutes an abuse of our discretion, but does violence to the statutory language.

III. CONCLUSION

I believe it is reasonable to look at the statute in a way which gives meaning and reason to its separate provisions overall. In my view the majority's

failure to truly distinguish section 212(h) from other waiver provisions according to its statutory components impermissibly skews and distorts the majority's discretionary assessment. I believe that discretionary assessment is flawed further by the majority's over-reliance on an admission of culpability and the specific crime involved in lieu of a fair consideration, on balance, of the overwhelming evidence of strong family ties and the hardship the family faces without the respondent, as well as the respondent's role as a provider, reports of his good conduct, affirmations of his good character, and no evidence of anything other than a good prognosis for the future. I would grant the relief requested in the exercise of discretion.

DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

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24 I. & N. Dec. 204
Interim Decision: 3568

Decided June 19, 2007

In re Emeka Kenneth Abosi,

Respondent

File A76 407 054 - Bloomington

APPEARANCES: Herbert A. Igbanugo, Esquire, Minneapolis, Minnesota, *for Respondent*

Before:

Board Panel:
OSUNA, *Acting Chairman*;
PAULEY, *Board Member*,
GUENDELSBERGER, *Temporary Board Member*.

OPINION

PAULEY, *Board Member*:

In a decision dated October 13, 2005, an Immigration Judge found the respondent removable and ineligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (2000). The respondent has appealed from that decision. The appeal will be sus-

tained and the record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Nigeria who is married to a United States citizen. The record reflects that he adjusted his status to that of a lawful permanent resident on December 2, 2000, and departed the United States in May of 2001. Upon his return on January 30, 2002, he was found to be in possession of a small amount of marijuana, i.e., 0.7 grams, and was issued a citation for committing a petty misdemeanor in violation of Minnesota law. The respondent, who later pled guilty to the offense and paid a fine, was admitted to the United States as a returning lawful permanent resident at that time. He departed the United States again in August of 2002, but when he returned on November 6, 2002, he was not admitted because of his prior controlled substance offense. The respondent was placed in removal proceedings by the filing of a Notice to Appear (Form I-862), which alleged, inter alia, that he is an arriving alien. He was subsequently charged with being removable under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2000), as an alien convicted of a controlled substance violation.[1] The respondent

[1] The respondent's offense, which involved possession of fewer than 30 grams of marijuana, would not have subjected him to removal while he was still in the United States. *See* section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2000).

sought relief in the form of a waiver of inadmissibility pursuant to section 212(h) of the Act. Relying on 8 C.F.R. § 1245.1(f) (2005), the Immigration Judge determined that the respondent was required to apply for adjustment of status in conjunction with his application for a waiver under section 212(h) of the Act. However, citing 8 C.F.R. § 1245.2 (2005), the Immigration Judge found that the respondent was ineligible to adjust his status in removal proceedings because he is an arriving alien. Therefore, because the Immigration Judge did not believe that the respondent could pursue a waiver under section 212(h) of the Act independently of an adjustment of status application, he found the respondent ineligible for the requested waiver.

II. ANALYSIS

Section 212(h) of the Act permits the waiver of certain grounds of inadmissibility to allow an alien to apply or reapply "for a visa, for admission to the United States, or adjustment of status." It does not, on its face, bar arriving aliens from seeking such relief. Nor does the language of the statute require the filing of a concurrent application for adjustment of status. Moreover, 8 C.F.R. § 1245.1(f), the adjustment of status regulation on which the Immigration Judge relied, clearly applies only to those aliens *in the United States* who are seeking to overcome a ground of inadmissibility and are required to file a concurrent application for adjustment of status in order to obtain

a waiver.[2] In no way does it state that an alien like the respondent, who is seeking to return to the United States and already has lawful permanent resident status, must apply for adjustment of status in conjunction with his waiver request.

The respondent was initially charged with being an arriving alien upon his return to the United States. *See* 8 C.F.R. § 1.1(q) (2007) (defining an "arriving alien" in pertinent part as "an applicant for admission coming or attempting to come into the United States at a port-of-entry"). However, his situation is clearly contemplated by section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v) (2000).[3] In cases such as this, where the

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[2] This regulation is in Part 1245 of the Code of Federal Regulations, which is entitled "Adjustment of Status to that of Person Admitted for Permanent Residence," and provides, in relevant part, as follows:

> *Concurrent applications to overcome grounds of inadmissibility.* . . . [A]n application under this part shall be the sole method of requesting the exercise of discretion under sections 212(g), (h), (i), and (k) of the Act, as they relate to the inadmissibility of an alien *in the United States.*

8 C.F.R. § 1245.1(f) (emphasis added).

[3] Section 101(a)(13)(C) of the Act provides in pertinent part as follows:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
>
> (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) . . . .

respondent is a returning lawful permanent resident charged with a ground of inadmissibility, a grant of a 212(h) waiver of inadmissibility simply eliminates the basis for his inadmissibility and leaves his lawful permanent resident status intact. *See Matter of Millard,* 11 I. & N. Dec. 175, 177-78 (BIA 1965); *see also Matter of Sanchez,* 17 I. & N. Dec. 218 (BIA 1980). In this respect it is similar to a grant of a waiver under former 212(c) of the Act, 8 U.S.C. § 1182(c) (1988), which "returns an alien to the same lawful permanent resident status previously held." *Matter of Gordon,* 20 I. & N. Dec. 52, 55 (BIA 1989); *see also Matter of Przygocki,* 17 I. & N. Dec. 361, 364 (BIA 1980). Consequently, there is no reason to require the respondent to reapply for adjustment of status in conjunction with a section 212(h) waiver.

Furthermore, we note that the respondent has not lost his lawful permanent resident status, which is not terminated until a removal order against him becomes final. *See Matter of Lok,* 18 I. & N. Dec. 101 (BIA 1981), *aff'd, Lok v. INS,* 681 F.2d 107 (2d Cir.1982) (holding that an act or event that provides a basis for an alien's deportation does not in itself terminate his lawful permanent resident status, which ends, as a result of his commission of a deportable offense, only upon the entry of a final administrative order of deportation); 8 C.F.R. § 1.1(p) (stating that the term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States . . ., such status not having changed" and that "[s]uch

status terminates upon entry of a final administrative order of . . . removal"). Therefore, since there is no final order of removal in this case, the respondent does not need to adjust his status in order to retain his status as a lawful permanent resident.

We conclude that the respondent is eligible for a waiver under section 212(h) of the Act, which, if granted, would resolve the charge of removability against him.[4] As a returning lawful permanent resident, he is not required to file an application for adjustment of status in conjunction with his waiver request. Accordingly, the respondent's appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.[5]

ORDER The appeal is sustained.

FURTHER ORDER The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

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[4] We note that the Immigration Judge stated in his decision that if the respondent was determined on appeal to be eligible for a waiver under section 212(h) of the Act, he would grant the waiver in the exercise of discretion.

[5] In light of our disposition of this case, we find it unnecessary to address the respondent's motion to remand, which was filed on July 10, 2006.

General Docket
US Court of Appeals for the Second Circuit

Second Circuit Court of Appeals

INDIV
DISPOSED

Court of Appeals Docket #: 07-1884-ag
Nsuit:

Henry v. Gonzales Filed 5/3/07

Appeal from: Immigration & Naturalization Service

Case type information:

Agency
Petition for Review
None

Lower court information:

District: A38-619-316
Trial Judge:
MagJudge
Date Filed
Date order/judgement:
Date NOA filed: 5/3/ 2007

Fee status: Paid

Panel Assignment:
Panel: RSP LAK DAL 500 Pearl

Date of decision: 2/11/08

Prior cases: NONE

Current cases NONE

Official Caption 1/

Docket as of June 19, 2008 8:21pm Page 1
INDIV
DISPOSED

Docket No. [s] : 07-1884-ag

USCA2 Docket Sheet for 07-1884-ag **Page 2 of 6**

Jenny Lee Henry, also known as Karen Allen, also known as Karen Henry, also known as Annette Williams, also known as Andrea Scantlebury, also known as Williams Sherlly, also known as Jennylee Henry, also known as Lorna Williams, also known as Sharon Smith,also known as Jennymary Henry, also known as Shelly Williams, also known as Williams,

Petitioner,

v.

Alberto Gonzales, Attorney General of The United States,

Respondent.

Authorized Abbreviated Caption 2/

Docket No. [s] : 07-1884-ag

Henry v. Gonzales

1/ Fed. R. App. P. Rule 12 [a] and 32 [a].

2/ For use on correspondence and motions only.

Jenny Lee Henry	Lindsee P. Granfield Esq.
Petitioner	[LD ret] Cleary Gottlieb Steen & Hamilton, LLP 1 Liberty Plaza New York , NY , 10006 212-225-2000
Alberto Gonzales	Sarah Maloney Esq.
Respondent	[LD ret] U.S. Department of Justice, Civil Division Office of Immigration Washington , DC , 200448 202-616-1436

USCA2 Docket Sheet for 07-1884-ag **Page 3 of 6**

5/3/07	Case Docketed: Petition for review of agency order on behalf of PETITIONER Jenny Henry, filed. [Entry date May 8 2007] [EJ]

5/3/07	Copy of receipt re: payment of docketing fee filed on behalf of PETITIONER Jenny Henry, #187838. [Entry date May 8 2007] [EJ]
5/3/07	Copy of agency decision and order dated 4/26/07 filed. [Entry date May 8 2007] [EJ]
5/3/07	Copy of agency decision and order dated 1/19/07 filed. [Entry date May 8 2007] [EJ]
5/3/07	Copy of the decision and order of the immigration judge, dated 12/9/05 filed. [Entry date May 8 2007] [EJ]
5/8/07	Served copy of petition under cover letter on respondent. [Entry date May 8 2007] [EJ]
5/11/07	PETITIONER Jenny Henry, Form C/A filed, with proof of service. [Entry date May 15 2007] [EJ]
5/11/07	Notice of appeal acknowledgment letter from Lindsee Granfield received. [Entry date May 17 2007] [EJ]
5/15/07	Scheduling order #1 filed. Record of certified list due 6/14/2007. [Entry date May 15 2007] [EJ]
5/15/07	Notice to counsel re: scheduling order. [Entry date May 15 2007] [EJ]
5/18/07	Notice of appeal acknowledgment letter from Sarah Maloney received. [Entry date May 23 2007] [EJ]

5/18/07 Petitioner Jenny Henry motion stay of deportation/removal filed with proof of service. [Entry date May 21 2007] [EJ]

6/18/07 CD Rom Record on Appeal Filed. [Entry date Jun 21 2007] [EJ]

6/26/07 Scheduling order #1 filed. Petitioners brief due 8/16/2007. Respondents brief due 9/17/2007. Ready week 10/29/2007. Per SAB, Staff Counsel. [Entry date Jun 28 2007] [EJ]

6/26/07 Pre-Argument Conference Notice and Order from Stanley A. Bass, Scheduled For: 7/17/07 @3:30pm, Filed. [Entry date Jun 28 2007] [EJ]

7/17/07 Order FILED GRANTING motion stay of deportation/removal by Petitioner Jenny Henry, endorsed on motion dated 5/18/2007. "On consent, it is hereby ordered that the motion is GRANTED." For the Court, by SAB, Staff Counsel. [Entry date Jul 19 2007] [EJ]

7/19/07 Notice to counsel re: order filed 7/17/07. [Entry date Jul 19 2007] [EJ]

7/19/07 Certified copy of the order filed 7/17/07 issued to the agency [informational only]. [Entry date Jul 19 2007] [EJ]

8/16/07 PETITIONER Jenny Henry, brief filed with proof of service. [Entry date Aug 17 2007] [EJ]

8/16/07 Joint appendix filed w/pfs. 3 volumes. [Entry date Aug 17 2007] [EJ]

8/16/07 Petitioner PETITIONER Jenny Henry, special appendix filed (w/pfs). [Entry date Aug 17 2007] [EJ]

8/16/07 Notice of appearance form on behalf of Lindsee Granfield, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Aug 17 2007] [EJ]

9/12/07 Notice of appearance form on behalf of Sarah Maloney, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Sep 14 2007] [EJ]

9/12/07 Letter received from Respondent's attorney requesting an extension of time. [Entry date Sep 14 2007] [EJ]

9/14/07 Scheduling order #3 filed. Respondents brief due 10/17/2007. Ready week 12/3/2007.

[Entry date Sep 14 2007] [EJ]

9/14/07 Notice to counsel re: scheduling order #3. [Entry date Sep 14 2007] [EJ]

10/24/07 RESPONDENT Alberto Gonzales, brief filed with proof of service. [Entry date Nov 1 2007] [EJ]

10/24/07 Notice of appearance form on behalf of Sarah Maloney, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Nov 1 2007] [EJ]

10/26/07 Argument Requested—Local Rule 34 Acknowledgment Returned by RESPONDENT Alberto Gonzales [Some parties seek oral

argument (Henry)] [Entry date Oct 26 2007] [AV]

11/5/07 Notice of appearance form on behalf of Lindsee Granfield, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Nov 7 2007] [EJ]

11/5/07 PETITIONER Jenny Henry, reply brief filed with proof of service. [Entry date Nov 8 2007] [EJ]

11/7/07 Proposed for argument the week of 01/28/08. [Entry date Nov 7 2007] [CA]

11/19/07 Argument Requested—Local Rule 34 Acknowledgment Returned by PETITIONER Jenny Henry, [Some parties seek oral argument] [Entry date Nov 19 2007] [AV]

12/18/07 Set for argument on 2/1/08 [Entry date Dec 18 2007] [SC]

12/28/07	Calendar argument notice mailed to attorneys/parties. [Entry date Dec 28 2007] [RD]
1/9/08	Notice of appearance form on behalf of Lindsee Granfield, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Jan 10 2008] [YS]
2/1/08	Case heard before: POOLER, LIVINGSTON, C.JJ., KAPLAN, D.J. [Entry date Feb 1 2008] [SC]
2/11/08	Petition for Review is DENIED by detailed order of the court without opinion filed.

	(RSP) [Entry date Feb 11 2007] [MR]
2/11/08	Notice to counsel re: Order dated 02-11-2008. [Entry date Feb 11 2008] [MR]
3/21/08	Letter received from Andrew Scott, Cleary Gottlieb, Steen & Hamilton, requesting oral argument CD, fee paid, receipt # 192462, forwarded to calendar [Entry date Mar 21 2008] [NS]
3/24/08	Oral argument CD picked up by Cleary Gottlieb [Entry date Mar 24 2008] [LY]
3/27/08	PETITIONER Jenny Henry, petition for rehearing received. [Entry date Mar 28 2008] [MR]

3/28/08 Petitioner Jenny Henry motion petition for rehearing and petition for rehearing en banc filed with proof of service. [Entry date

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Mar 31 2008] [MR]

5/23/08 Notice to counsel re: Order dated 05/23/2008. [Entry date May 23 2008] [MR]

5/23/08 Order FILED DENYING motion Petition for rehearing by Petitioner Jenny Henry, endorsed on motion dated 3/28/2008, Order FILED DENYING motion Petition for rehearing en banc by Petitioner Jenny Henry, endorsed on motion dated 3/28/2008. [Entry date May 23 2008] [MR]

5/30/08 Petitioner Jenny Henry motion stay the mandate pending petition for certiorari filed with proof of service. [Entry date May 30 2008] [MR]

6/10/08 Notice to counsel re: Order dated 06/10/2008. [Entry date Jun 10 2008] [MR]

6/10/08 IT IS HEREBY ORDERED that Petitioner Henry is GRANTED a 30-day stay of the mandate. If a certiorari petition is filed within 30-days, the stay is extended until the Supreme Court disposes of the certiorari petition. Before RSP, DAL, Cjs. LAK, Dj. [Entry date Jun 10 2008] [MR]

6/10/08 Respondent's opposition to motion stay the mandate filed with proof of service. [Entry date Jun 13 2008] [MR]

6/12/08 Respondent Alberto Gonzales motion to

reconsider decision to grant petitioner's motion to stay the mandate filed with proof of service. [Entry date Jun 13 2008] [MR]

6/18/08 Petitioner's opposition to motion to reconsider decision filed with proof of service. [Entry date Jun 19 2008] [MR]

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Supreme Court, U.S.
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No. 08-68

In the Supreme Court of the United States

JENNY LEE HENRY, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for discretionary relief from removal.

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In the Supreme Court of the United States

No. 08-68

JENNY LEE HENRY, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is reprinted in 264 Fed. Appx. 62. The opinions of the Board of Immigration Appeals (Pet. App. 18a-28a) and the immigration judge (Pet. App. 31a-74a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2008. A petition for rehearing was denied on May 23, 2008 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on July 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that several classes of

aliens are inadmissible to the United States. See INA § 212(a), 8 U.S.C. 1182(a). The Attorney General has discretion, under certain conditions, to waive the applicability of some of those grounds of inadmissibility, including (as relevant here) inadmissibility based on having committed multiple crimes involving moral turpitude. INA § 212(h), 8 U.S.C. 1182(h); see INA § 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I).

An alien is eligible to seek a Section 212(h) waiver only if she meets the statutory requirements. As relevant here, "in the case of an immigrant who is the * * * parent * * * or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence," an alien may show eligibility by demonstrating "that the alien's denial of admission would result in extreme hardship to * * * [her] parent * * * or daughter." INA § 212(h)(1)(B), 8 U.S.C. 1182(h)(1)(B); see also § 212(h)(2), 8 U.S.C. 1182(h)(2).

In addition to satisfying the statutory eligibility requirements, an applicant for a Section 212(h) waiver must establish that she warrants such relief as a matter of discretion. See, *e.g.*, *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 299 (B.I.A. 1996) (en banc). An application for such a waiver, however, "may be denied in the exercise of discretion without express rulings on the question of statutory eligibility." *Id.* at 301 (citing, inter alia, *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985), and *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976)).

By its terms, the Section 212(h) waiver applies to aliens charged in removal proceedings with being *inadmissible* to the United States. The Board of Immigration Appeals (BIA) has interpreted Section 212(h) as also applying to aliens who are charged with deportability, in two circumstances: if the basis for the charge

also made the alien inadmissible the last time she entered the country, see *In re Sanchez*, 17 I. & N. Dec. 218, 223 (B.I.A. 1980), or if the alien concurrently files an application for adjustment of status and thus puts herself in the same position as an alien presenting herself at the border seeking admission. See *In re Parodi*, 17 I. & N. Dec. 608, 611 (B.I.A. 1980); see also INA § 245, 8 U.S.C. 1255 (governing adjustment of status); 8 C.F.R. 1245.1(f).

b. Separately, the Attorney General also has discretion to cancel the removal of certain aliens who have been lawful permanent residents for five years and resided continuously in the United States for seven years. INA § 240A(a), 8 U.S.C. 1229b(a). As with Section 212(h) waivers, an applicant for cancellation of removal must establish not only that she meets the statutory criteria for eligibility but also that she warrants such relief as a matter of discretion. *E.g.*, *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998).

c. Since 1996, the INA has barred judicial review of the Attorney General's exercise of discretion in granting or denying waivers of inadmissibility under Section 212(h) and cancellation of removal under Section 240A. INA § 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i). In 2005, Congress qualified that jurisdictional bar by providing that it does not "preclud[e] review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. INA § 242(a)(2)(D), 8 U.S.C. 1252(a)(2)(D).

2. Petitioner, a native and citizen of Guyana, was admitted to the United States as a lawful permanent resident. Pet. App. 32a. She has since been convicted of more than 30 crimes, including felony third-degree bur-

glary, disorderly conduct, endangering the welfare of a child, and more than 20 incidents of petit larceny. *Id.* at 20a, 33a, 40a-43a, 48a, 71a.

In June 2000, the former Immigration and Naturalization Service commenced removal proceedings and charged that petitioner was subject to removal on the basis of three of her convictions for petit larceny, which is a crime involving moral turpitude. Pet. App. 33a; see INA § 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii) (providing for removal based on conviction of two or more crimes involving moral turpitude). Petitioner, through counsel, conceded removability and applied for discretionary relief, including cancellation of removal and a Section 212(h) waiver. Pet. App. 34a, 36a. An immigration judge (IJ) found petitioner removable as charged. See *id.* at 34a. Although the IJ initially found petitioner ineligible for cancellation of removal, that eligibility determination was reversed on federal habeas review on grounds not relevant here, see *Henry* v. *Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001), and her applications for discretionary relief proceeded before the IJ.

3. Following four hearings on the merits of her applications for cancellation of removal and a Section 212(h) waiver, the IJ denied discretionary relief and ordered petitioner removed to Guyana. Pet. App. 36a, 74a.

a. First, the IJ denied petitioner's request for cancellation of removal on the ground that petitioner failed to establish that a favorable exercise of discretion was warranted. Pet. App. 60a-61a, 65a-72a. He "balanced the adverse factors evidencing [petitioner's] undesirability as a permanent resident with the social and humane considerations presented" on her behalf and on behalf of her United States citizen relatives. *Id.* at 65a-67a.

The IJ found that petitioner had demonstrated considerable positive equities. Pet. App. 65a-67a. In particular, he performed a lengthy analysis of the "strong evidence that [petitioner] and her family, including her five minor U.S. citizen children and her mother, would suffer hardship" if petitioner were removed. *Id.* at 66a-67a. He considered that petitioner's children had never visited Guyana and would have far fewer opportunities and poorer access to medical care and benefits in that country (particularly petitioner's second daughter, who suffers from eczema and receives SSI benefits). The IJ concluded that "[t]here is no doubt that [petitioner]'s removal could cause severe emotional and economic hardship to [petitioner]'s family." *Id.* at 67a. He also considered her "strong family ties in the United States," including five minor United States citizen children, a United States citizen mother, a lawful permanent resident father, and five resident siblings, compared with almost no family ties in Guyana. *Id.* at 65a-66a.

Ultimately, however, the IJ determined that the adverse factors outweighed that positive evidence and warranted discretionary denial of petitioner's application. He considered the nature and underlying circumstances of petitioner's petit larceny offenses that served as the basis for her removal charge, her substantial criminal record, her insufficient efforts at rehabilitation, and other indicators of her bad character or undesirability as a permanent resident of this country. Those factors, he concluded, outweighed the social and humane considerations in favor of cancellation of removal. Pet. App. 67a-72a.

b. Second, the IJ denied petitioner's request for a Section 212(h) waiver. The IJ gave two grounds. He concluded that petitioner was ineligible for Section

212(h) relief because she was in deportation proceedings and had not been charged with inadmissibility, nor had she applied for adjustment of status in conjunction with her waiver request (which would have entitled her to be treated as eligible for Section 212(h) relief). Pet. App. 72a-73a; see pp. 2-3, *supra*. In the alternative, assuming arguendo that petitioner had established her eligibility for the waiver, the IJ found that petitioner had failed to establish that a favorable exercise of discretion was warranted, "for the reasons indicated" in his discretionary denial of her request for cancellation of removal. Pet. App. 73a.

4. The BIA affirmed the IJ's decision in part. Pet. App. 20a-28a.

a. The BIA determined that the IJ, when balancing the equities, had accorded appropriate weight to the evidence of hardship to petitioner and her family, to petitioner's extensive criminal activity and failure to rehabilitate, and to her lack of credibility. Pet. App. 20a-27a. On those grounds, the BIA agreed with the IJ's discretionary denial of petitioner's request for cancellation of removal. *Id.* at 27a.

b. The BIA did not reach the question whether petitioner was eligible for Section 212(h) relief. Pet. App. 28a. Rather, it affirmed the IJ's alternative discretionary denial of petitioner's request for such a waiver, for the same reasons that it agreed with the IJ's discretionary denial of cancellation of removal. *Ibid.* The BIA added that "[a]ny hardship that [petitioner's] family will face upon her removal to Guyana does not outweigh her substantial criminal history." *Ibid.*

5. The court of appeals dismissed a petition for review, in an unpublished summary order. Pet. App. 1a-7a. The court concluded that it lacked jurisdiction to

consider any of petitioner's claims of error. *Id.* at 6a. As relevant here, the court noted that petitioner argued that the BIA should have decided whether she was eligible for Section 212(h) relief by virtue of "extreme hardship" for her family, so that it could properly weigh hardship in the equitable balance in deciding whether to grant discretionary relief. *Id.* at 5a. But the court determined that "[t]he agency * * * [had] expressly considered the hardship her family would suffer." *Id.* at 5a-6a (citing, for example, *id.* at 66a). Therefore, the court concluded, petitioner's complaint was "that the agency did not give her hardship enough weight in balancing the equities." *Id.* at 6a. The court determined that it lacked jurisdiction to review such an exercise of discretion. *Ibid.* (citing INA § 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i), and *Xiao Ji Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006)).

The court of appeals reviewed only the BIA's decision, not the aspects of the IJ's ruling that the BIA had not adopted. Pet. App. 4a. Accordingly, the court, like the BIA, did not reach the issue of whether petitioner was eligible for a Section 212(h) waiver.

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to review the BIA's discretionary decision denying petitioner relief. Petitioner does not assert that that holding conflicts with any decision of this Court or of another court of appeals, and her fact-bound challenge to the jurisdictional holding lacks merit. Because the court of appeals correctly dismissed the appeal for lack of jurisdiction, it properly did not consider either of the questions presented by the petition for a writ of certiorari (see Pet. i). Nor did the BIA need to consider the

constitutional issue on which petitioner contends the courts of appeals are divided, because that issue pertains only to petitioner's *eligibility* for discretionary relief, and the BIA simply assumed that petitioner was eligible. Further review therefore is not warranted.

1. The court of appeals correctly concluded that it lacked jurisdiction because the INA does not provide for judicial review of the BIA's discretionary judgments to deny cancellation of removal or a waiver of inadmissibility under Section 212(h). Under the INA's express terms, "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" Section 212(h), 8 U.S.C. 1182(h), which provides for waivers of inadmissibility, or Section 240A, 8 U.S.C. 1229b, which governs cancellation of removal. INA § 242(a)(2)(B)(i), 8 U.S.C. 1252(a)(2)(B)(i). The court of appeals' straightforward application of that jurisdictional bar does not warrant further review.[1]

Petitioner contends that her claim falls within an exception to that bar. The courts of appeals retain jurisdiction to review "constitutional claims or questions of law" raised in a petition for review. INA § 242(a)(2)(D), 8 U.S.C. 1252(a)(2)(D). Petitioner maintains (Pet. 27-35) that the BIA's denial of a waiver of inadmissibility was legally erroneous and that her petition therefore presented a question of law. That contention lacks merit.

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[1] The government argued in the court of appeals that judicial review is also barred by Section 242(a)(2)(C) of the INA, 8 U.S.C. 1252(a)(2)(C), which precludes review of most removal orders against criminal aliens. Petitioner falls within that bar because she committed two or more crimes involving moral turpitude, each of which carried a possible penalty of one year of imprisonment. See *ibid.*; INA § 237(a)(2)(A)(i) and (ii), 8 U.S.C. 1227(a)(2)(A)(i) and (ii); see also Pet. App. 33a-34a (petitioner's concession of removability on this basis).

Petitioner's claim of legal error is based on the notion that the BIA's discretionary decision to deny relief did not give adequate consideration to the hardship she and her family would suffer as a result of her removal. Pet. App. 5a-6a. Both the IJ and the BIA extensively discussed the evidence of hardship petitioner's family would suffer if she were removed. *Id.* at 6a, 20a-21a, 28a, 65a-67a. And, as petitioner acknowledged in the court of appeals, see *id.* at 5a, 171a, the BIA was not required to make an express finding on the threshold question whether petitioner was eligible for a waiver because of "extreme hardship." Rather, it was entirely permissible for the agency to move directly to the discretionary weighing of the equities. *Bagamasbad*, 429 U.S. at 25.

Despite the immigration courts' express consideration of hardship, petitioner contends that the failure to make a factual finding that the hardship was "extreme" was legal error. In making that contention, petitioner relies on the BIA's decision in *In re Mendez-Moralez*, 21 I. & N. Dec. 296 (1996) (en banc) (Pet. App. 293a-332a), in which the BIA stated that "[e]xtreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered." *Id.* at 301. In petitioner's view, the IJ or the BIA *must* make the threshold eligibility determination of whether the alien has established the requisite extreme hardship that could in turn weigh as one favorable factor in the exercise of discretion. See Pet. 12-13, 27-29. That contention is refuted by *Mendez-Moralez* itself—the very BIA precedent on which petitioner relies—which expressly states (in the very next sentence) that "an application for discretionary relief, including a waiver under section 212(h), may be denied in the exercise of discre-

tion without express rulings on the question of statutory eligibility." 21 I. & N. Dec. at 301.

Moreover, the discretionary balancing that determines whether a waiver will be granted or denied properly considers *any* degree of hardship to petitioner or her family, including harm not necessarily covered in the eligibility finding of "extreme hardship" to the family members of an alien who are United States citizens or lawful permanent residents. "[Petitioner's] complaint, therefore, is that the agency did not give her hardship enough weight in balancing the equities," and the court of appeals correctly concluded that it lacked jurisdiction over that complaint. Pet. App. 6a.

Petitioner identifies no conflict in the courts of appeals on this jurisdictional issue, and none is apparent. To the contrary, the courts of appeals have broadly recognized that the jurisdictional bar to challenging the agency's discretionary weighing cannot be circumvented simply by asserting that the challenge is a "legal" one. See, *e.g.*, *Xiao Ji Chen*, 471 F.3d at 330-331 ("[A] petitioner's mere resort to the terms conventionally used in describing constitutional claims and questions of law will not overcome Congress's decision to deny jurisdiction over claims which in reality consist of nothing more than quarrels over the correctness of fact-finding and of discretionary decisions."); *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 126 S. Ct. 2973 (2006).

2. Even if petitioner's challenge to the BIA's discretionary determination were considered a legal one, it

would plainly be foreclosed. Without any possibility that she could overturn the BIA's decision not to grant her a waiver, there still would have been no occasion to address the constitutional issue pertaining to *eligibility* for a waiver (to which she devotes most of her petition).

As discussed above, petitioner asserts that the BIA committed legal error by giving inadequate consideration to the hardship her family faces. Although she acknowledges that the BIA and the IJ considered that hardship, she contends that they erred by failing to label that hardship "extreme" before weighing it and by conducting similar analyses under the cancellation-of-removal and waiver-of-inadmissibility provisions. Those contentions lack merit. When balancing the equities under *either* provision, the BIA weighs the hardship to the alien *and* her family. See, *e.g.*, *C-V-T-*, 22 I. & N. Dec. at 11 (in making cancellation-of-removal decisions, "favorable considerations include * * * evidence of hardship to the respondent and his family if deportation occurs"); *Mendez-Moralez*, 21 I. & N. Dec. at 299-301 (same, in considering discretionary waiver of inadmissibility). Although "extreme hardship" to a family member is a prerequisite to obtaining a waiver of inadmissibility under Section 212(h),[2] there is no requirement that the BIA consider only hardships that it determines to be "extreme," nor would petitioning aliens want the BIA to be so restricted. See, *e.g.*, *id.* at 303 (considering both "extreme hardship" to alien's wife and children and

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[2] "Extreme hardship" is not a prerequisite to cancellation of removal, but as the cited decisions show, hardship is a favorable consideration in deciding whether to grant that relief, just as it is in deciding whether to grant a waiver of inadmissibility under Section 212(h). Petitioner's contention that the BIA erred by analyzing hardship considerations identically under the two provisions (Pet. 29) is meritless.

"[s]ome hardship" to alien himself). Thus, there is no requirement that the BIA denominate some or any harms as "extreme" before undertaking the weighing analysis.

And even if the BIA had considered whether the hardship to petitioner's family was "extreme" and determined that it was, the countervailing considerations would assuredly have caused the BIA to deny discretionary relief in any event. See Pet. App. 28a ("*Any* hardship that [petitioner's] family will face upon her removal to Guyana does not outweigh her substantial criminal history.") (emphasis added); see also *id.* at 21a, 26a-27a (noting petitioner's lack of rehabilitation and her lack of candor in the immigration proceedings as additional considerations weighing against discretionary relief).

3. Because the BIA has decided to deny petitioner the discretionary relief she seeks, and because that decision is unreviewable (and, in any event, legally unimpeachable), this case presents no occasion to consider petitioner's assertion that the Constitution requires that she be deemed eligible for that discretionary relief. The BIA assumed she was eligible just as she says she is. Pet. App. 27a. Because the BIA's decision constitutes the final, reviewable order on this issue, the court of appeals acted entirely appropriately in not taking up an irrelevant constitutional question. Further review on this question therefore is not warranted. Petitioner's assertion that she pressed her constitutional arguments below (Pet. 36) is beside the point: those arguments simply make no difference to the outcome of her case, in light of the fact-bound and entirely accurate reasons for dismissing her petition for review.

Moreover, even if the issue were properly presented, it would not warrant certiorari at this time. The case on which petitioner principally relies, *Po Shing Yeung* v.

INS, 76 F.3d 337 (11th Cir. 1995), does not hold that aliens in petitioner's situation *must* be treated as eligible for a discretionary waiver of inadmissibility under Section 212(h). The court of appeals acknowledged that Congress could permissibly limit Section 212(h) relief to aliens arriving at the border and could disqualify all aliens being deported from within the United States from seeking that relief. But, the court of appeals held, if the BIA permits some (but not all) aliens in deportation proceedings to apply for Section 212(h) relief, it must have a rational basis for whatever distinction it makes among aliens in deportation proceedings. The Eleventh Circuit thought such a rational basis was lacking in that case: the BIA would have permitted the alien to apply for Section 212(h) relief if he had departed and re-entered the country after committing the offense that was the subject of the waiver request, and the Eleventh Circuit thought there was no rational reason for that distinction. The court of appeals therefore remanded to the BIA to better harmonize its application of Section 212(h) to aliens in deportation proceedings. *Id.* at 341. It did not require that the alien be found eligible, however, and a subsequent statutory amendment conclusively established that he was not. *In re Po Shing Yeung*, 21 I. & N. Dec. 610, 611 (B.I.A. 1996) (en banc).

The Eleventh Circuit's outlier decision is not applicable here. As the Seventh Circuit has subsequently recognized, aliens have another means of qualifying for a Section 212(h) waiver while within the United States: they can apply for adjustment of status, which puts them in "the position of somebody seeking admission" and therefore eligible to seek a waiver of inadmissibility. *Klementanovsky* v. *Gonzales*, 501 F.3d 788, 794 (7th Cir. 2007). The Eleventh Circuit in *Po Shing Yeung* did not

consider how this other option might affect the rationality of Congress's decision to extend Section 212(h) eligibility to some (but not all) deportable aliens. Petitioner here did not apply for adjustment of status, Pet. 17, and the necessary visa may not have been available; thus, the immigration authorities never had the opportunity to consider her suggestion that this avenue was not in fact open to her, see Pet. 17-18.

Moreover, the Eleventh Circuit's decision gave inadequate consideration to Congress's valid interests in preserving a distinction between arriving aliens and aliens already admitted to the country. See *Klementanovsky*, 501 F.3d at 792-793 (finding *Po Shing Yeung* "unpersuasive," because "[w]e can think of plenty of rational reasons why Congress might have chosen to draw this line between criminal aliens who have left the country and those who have stayed"). Because *Po Shing Yeung* was decided in an interlocutory posture, was effectively mooted on remand by a subsequent statute, and has never been followed by the Eleventh Circuit or any other court of appeals, it would provide an inadequate basis for plenary review even if the issue were presented here. But that issue is not presented, and for that reason as well, it furnishes no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008